Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1974

No. 73-2024

ROBERT WARTH, Individually and on behalf of all other persons similarly situated, LYNN REICHERT, Individually and on behalf of all other persons similarly situated, VICTOR VINKEY, Individually and on behalf of all other persons similarly situated, KATHERINE HARRIS, Individually and on behalf of all other persons similarly situated, ANDELINO ORTIZ, Individually and on behalf of all other persons similarly situated, CLARA BROADNAX, Individually and on behalf of all other persons similarly situated, ANGELEA REYES, Individually and on behalf of all other persons similarly situated, ROSA SINKLER, Individually and on behalf of all other persons similarly situated, METRO-ACT OF ROCHESTER, INC., HOUSING COUNCIL IN THE MONROE COUNTY AREA, INC., ROCHESTER HOME BUILDERS ASSOCIATION, INC.,

Petitioners,

vs

IRA SELDIN, Chairman, JAMES O. HORNE, MALCOLM M. NULTON, ALBERT WOLF, JOHN BETLEM, as members of the Zoning Board of the Town of Penfield; GEORGE SHAW, Chairman, JAMES HARTMAN, JOHN D. WILLIAMS, RICHARD C. ADE, TIMOTHY WESTBROOK, as members of the Planning Board of the Town of Penfield; IRENE GOSSIN, Supervisor, FRANCIS J. PALLISCHECK, DR. DONALD HARE, LINDSEY EMBREY, WALTER W. PETER, as members of the Town Board of the Town of Penfield, and the TOWN OF PENFIELD, NEW YORK,

Respondents.

— *over* —

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(493)

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Board of the Town of Penfield, and the TOWN OF PENFIELD, NEW YORK,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Petitioners, Robert Warth, Lynn Reichert, Victor Vinkey, Katherine Harris, Andelino Ortiz, Clara Broadnax, Angelea Reyes, Rosa Sinkler, individually and on behalf of all other persons similarly situated, Metro-Act of Rochester, Inc., Housing Council in the Monroe County Area, Inc., and Rochester Home Builders Associations, Inc., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled matter on April 18, 1974.

Opinion Below

The judgment of the Court of Appeals for the Second Circuit, which was entered on April 18, 1974, affirmed the District Court's dismissal of the complaint and the denial of a motion to intervene on the ground that plaintiffs and intervenors lack standing. The opinion is attached hereto as Appendix A. The opinion of the District Court for the Western District of New York, dated December 27, 1972, is attached hereto as Appendix B and is not officially reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on April 18, 1974, and this Petition for Certiorari was filed within ninety (90) days from that date. Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1).

Question Presented

Whether individual and organizational plaintiffs have standing to challenge defendants' racially discriminatory and exclusionary zoning ordinance, practices, and policies which deprive plaintiffs of constitutional and statutory rights and cause them to suffer economic damage and loss of the social benefits of living in an integrated community.

Constitutional and Statutory Provisions

This petition involves the First, Ninth and Fourteenth Amendments to the Constitution of the United States; 42 U.S.C. § 1981; 42 U.S.C. §1982; and 42 U.S.C. § 1983. (Pertinent constitutional and statutory provisions are set forth in Appendix C.)

Statement of Case

Plaintiff-petitioners are individuals and organizations which have been adversely affected both by the Town of Penfield's zoning ordinance and by defendants' administration of that law. The named plaintiffs instituted this action on behalf of themselves and a class consisting of all taxpayers residing in the contiguous City of Rochester, New York, all low and moderate income persons residing in the City, all black and Spanish-surnamed citizens residing in the City of Rochester, and all persons employed, but excluded from living, in the Town of Penfield who are, or may in the future be, affected by defendants' racially discriminatory and exclusionary zoning practices and policies. (Pertinent portions of Penfield Zoning Ordinance are set forth in Appendix D.)

Defendants-respondents are the individual members of the Zoning Board, Planning Board, and Town Board of the Town of Penfield, Monroe County, New York. Additionally, the suburban Town of Penfield, New York, which is a municipal corporation adjacent to the City of Rochester, New York, is a defendant-respondent in this action.

Petitioners[1] instituted this action alleging that defendants' zoning ordinance, as enacted and administered, excludes members of minority groups[2] and low income persons from residency in the Town of Penfield, New York. As a result of the exclusionary and discriminatory zoning ordinance, as well as defendants' implementation of that ordinance, petitioners have been, and are being, forced to suffer the deprivation of rights secured by the First, Ninth and Fourteenth Amendments to the Constitution of the United States and by the Civil Rights Act of 1866[3] and the Civil Rights Act of 1871.[4]

The District Court for the Western District of New York[5] dismissed the complaint for lack of standing and failure to state a claim upon which relief could be granted. The Second Circuit affirmed solely on the ground that petitioners lack standing. Petitioners now seek review of that determination.

For purposes of the motion to dismiss in the District Court, as well as this petition for certiorari, plaintiffs' factual allegations must be accepted as true. These allegations reveal that the purpose and effect of Penfield's zoning ordinance, as enacted and administered, are to prohibit nonwhite and nonaffluent

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[1] Petitioners WARTH, REICHERT, VINKEY, HARRIS, ORTIZ, BROADNAX, REYES, SINKLER and METRO-ACT OF ROCHESTER, INC. are the named plaintiffs on the complaint.

Petitioner, HOUSING COUNCIL IN THE MONROE COUNTY AREA, INC. requested to be added as a party plaintiff and petitioner, ROCHESTER HOME BUILDERS ASSOCIATION, INC., sought leave to intervene. The District Court denied the requests and the Court of Appeals for the Second Circuit affirmed on the ground that these parties, as well as the named plaintiffs, lack standing. *Warth v. Seldin*, —F.2d—, —. Appendix A, infra, at 3.

[2] In 1970, only 60 of the 23,782 persons residing in Penfield were black. See Affidavit of Warth, Reichert Vinkey and Harris, at paragraph 9.

[3] 42 U.S.C. §§1981, 1982

[4] 42 U.S.C. §1983

[5] Jurisdiction is conferred upon the District Court by virtue of 28 U.S.C. §§1331 and 1343.

persons from residing in the Town of Penfield. The ordinance effectively bars the construction of any multiracial, low and moderate income housing in this suburban town. Indeed experts who have examined the ordinance have concluded:

> "Overall, the residential control aspects of the Penfield zoning ordinance must be classified as highly restrictive — essentially disallowing the construction of any new housing for low and moderate income individuals. Furthermore, in terms of public health, safety and welfare, there is no apparent justification to support the highly restrictive requirements of the residential (housing) provisions of the Penfield zoning ordinance. The zoning ordinance is not based on any current comprehensive plan and its provisions (for large lots, etc.) are neither explained nor justified within the ordinance nor within any planning document (known to these reviewers)."[6]

Defendants have accomplished this highly restrictive and exclusionary residential control by mandating such excessive requirements for house set back, lot size, lot width, minimum floor area and habitable space that in 1972, when this action was commenced, it was impossible to construct a single family dwelling in Penfield which cost less than $29,115.00 — a price far beyond the reach of most minority and low income persons. Pursuant to the zoning law, ninety-eight percent of all vacant land in the Town of Penfield is earmarked for construction of such single family housing. Only three-tenths of one percent of the vacant land is available for multi-family structures. Yet, even on this limited space, construction of multiracial, low and moderate income housing is precluded because the zoning ordinance requires low density for the apartment units and other unnecessary costs such as two parking spaces per unit and an enclosed garage for every unit. The construction of townhouses, use of mobile homes, or implementation of planned unit development are alternatives for providing adequate housing for

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[6] Affidavit of Kling, Taddiken, and Farley, at paragraph 17.

minority and low income families. However, defendants have established a series of rigid dimensional and density requirements which effectively prohibit the use of any of those alternatives.

In the posture of the instant case, the conclusion of the experts who have examined the ordinance is uncontradicted and binding upon this Court. Those experts agree that "The Penfield zoning ordinance is basically an inflexible control mechanism which has the effect of *producing economically and racially stratified housing arrangements* without apparent regard for the housing needs either of its own citizenry or for the citizenry within the larger metropolitan community." (emphasis added).[7]

Equally arbitrary and discriminatory is defendants' administration of the challenged ordinance. Defendants have continued their exclusionary practice by refusing to grant variances and building permits and by improperly using a special permit procedure. Moreover, they have failed to amend or waive certain provisions of the ordinance, including the zoning map and building specification requirements. So too, defendants refuse to either grant necessary tax abatements or cooperate with, assist and accommodate applicants for low and moderate income housing units. One member of Metro-Act of Rochester, Inc., who is a Penfield resident and was a participant in a project proposal for multiracial, low and moderate income housing, summarizes defendants' practices as 1) delaying action on proposals for inordinate periods of time; 2) denying approval of proposals for arbitrary reasons; 3) failing to provide necessary support services for low and moderate income housing units; and 4) amending the zoning ordinance to make the approval of such units virtually impossible.[8]

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[7]Id.

[8]Affidavit of Ann McNabb, at paragraph 4.

It is beyond cavil that Penfield's zoning ordinance has an exclusionary and racially discriminatory impact and that defendants' administration of the ordinance perpetuates the economically and racially stratified housing arrangements in the Town of Penfield. Yet, the Second Circuit held that plaintiffs do not have standing to challenge defendants' exclusion of nonwhite and nonaffluent families who are in desperate need of adequate housing units. In so doing, the court ignored the actual physical, economic and social injury suffered by the individual and organizational plaintiffs as a result of the zoning law and defendants' practices and policies in administering the ordinance.

Plaintiffs-petitioners, Ortiz, Broadnax, Reyes, and Sinkler, are persons of low or moderate income who have been excluded from the Town of Penfield because of their race and low income level. Plaintiff Ortiz, for example, is a Spanish-surnamed American who was dissatisfied with raising his children in the "ghetto environment" which exists in the decaying inner city section of Rochester, New York. Accordingly, in 1968 he began searching for a home in one of the surrounding suburban towns. Since at that time, and until May, 1972, he was working in the Town of Penfield, he initiated inquiries about renting or buying a home in that suburb. However, no multiracial, low and moderate income housing units were available and, thus, petitioner was forced to reside in Wayland, New York which is forty-two miles from his job in Penfield. Petitioner described his inconvenience and cost as follows:

> "Since I was unable to locate housing near my work in the Town of Penfield (employment dating from my arriving in Rochester in 1966 to May 1972) I have been forced by reason of the exclusionary practices of the Town of Penfield to reside in Wayland, New York, Town of Springwater (1971 through May 1972) forty-two miles from my work in Penfield. I worked five days a week, eight hours a day at St. Joseph's. I was at work

by 7:30 in the morning. Travel one way to the job in Penfield took at least one hour and ten minutes one way — in bad weather, the time involved one way to work was about two hours. The maximum distance from my job if I had been able to live in the Town of Penfield would have involved driving time of no more than twenty minutes to the job at St. Joseph's.

"... there was at least $2.56 involved each day in gasoline costs for my automobile or $12.80 involved in gasoline costs alone for my automobile to and from my work each week. Thus, in costs of gasoline alone, commuting to and from the job in Penfield has cost me $666.00 per year."[9]

The injury suffered by Ortiz is not limited to the burdensome commuting problems and costs. Rather, as he concluded, "Because our living environments are dictated by laws, practice and policies which prevent us from living where we might wish, we are forced, for example, to accept as a way of life, poor schools for our children, reduced job opportunities, inferior community services and added expenses of reaching employment."[10] The injury to Ortiz and his family is certainly not "too abstract, conjectural, and hypothetical to establish an Article III case or controversy."[11]

So too, plaintiffs Broadnax, Reyes and Sinkler and their respective families, have suffered actual injury as the result of defendants' exclusionary practices and policies. These plaintiffs sought housing in the Town of Penfield, but were excluded because of their race and income levels. The inner city environment in which they must reside is characterized by dilapidated, substandard housing, uncontrolled violence and insufficient or nonexistent community services. As a result of

[9] Affidavit of Andalino Ortiz, at paragraphs 13-14.

[10] Id. at paragraph 31.

[11] *Warth v. Seldin*, supra at —, Appendix A, infra at 12.

defendants' practices and policies of excluding low income persons and members of minority groups, plaintiffs are being denied their right to raise their children in an integrated environment and obtain the benefits of the improved housing conditions and community services in Penfield. One of the prime concerns of these plaintiffs is the educational disadvantages which their children are forced to suffer. Plaintiff Sinkler states:

"I have sought housing accommodations in the Rochester metropolitan area, including the Town of Penfield — all to no avail because I am a black person of low income. I would like an opportunity to live in the Town of Penfield; I believe I have a right to live in the Town of Penfield and to have access to decent housing in a decent environment.

"One of the most important reasons for my desiring to have an opportunity to live with my family in decent housing in a decent environment is my great concern that my children have an adequate education. I have already noted that I found the instruction in the public kindergarten and first grade to be so inadequate that I transferred my child to a parochial school. I understand that the public school in my area, school No. 20, has been rated among studies of Rochester City Schools as one of the lowest in terms of effective instruction of students. On the other hand, the Town of Penfield's schools rate high in studies which evaluate area schools. The Town of Penfield by its exclusionary policies, practices and laws has and continues, therefore, to cause me real harm by denying me the opportunity to reside there."[12]

Plaintiffs Warth, Reichert, Vinkey, and Harris suffer actual economic injury as a direct result of Penfield's exclusionary zoning ordinance and defendants' administration of that law. Each of these plaintiffs is a taxpayer and property owner residing in the City of Rochester, New York. They have alleged

[12] Affidavit of Rosa Sinkler, at paragraphs 16-17.

that defendants' exclusion of low and moderate income housing units forces the City of Rochester to assume the ever increasing burden of providing such housing, much of which is tax abated. As the amount of tax abated property in the City increases, individual property owners and taxpayers, such as plaintiffs, must assume a larger burden of the taxes which are needed to finance essential services. The tax rate in Rochester, for example, has continually risen from $42.06 per $1,000 assessed valuation in 1959 to $80.95 in 1972. This increased financial burden on property owners residing in the City of Rochester is attributable, in part, to the fact that Penfield refuses to provide its fair share of tax abated low and moderate income property and thus forces the City and its taxpayers to assume the cost.

Manifestly, plaintiffs Warth, Reichert, Vinkey and Harris have such a personal economic stake in the continuance of this litigation as to ensure the requisite concrete adverseness. Each of these plaintiffs is being forced to assume not only the economic hardship caused by spiraling property taxes, but also the social and environmental problems resulting from the concentration of multifamily, low and moderate income housing units in the urban area. "The effect of Penfield's exclusionary practices which create a concentration of low, moderate housing in the City of Rochester and produce . . . a density crush, also has direct effect on the City of Rochester residents in incidents of crime and provisions for law enforcement."[13]

Petitioners further contend that the organizational plaintiffs are also injured by defendants' zoning practices and policies and, accordingly, have standing to assert their claims in this action. Rochester Homebuilders Association, Inc., is a nonprofit trade association of persons and companies engaged in construction, development, and maintenance of residential housing in the metropolitan Rochester area. Over 110 of its members are engaged directly in the construction of sale and rental housing to

[13] Affidavit of Warth, Reichert, Vinkey and Harris, at paragraph 19.

the public at large. During the past 15 years, approximately 80% of the private housing units constructed in the metropolitan Rochester area — including the Town of Penfield — were constructed by members of this trade association.

The District Court denied the Home Builders Association's request to intervene and the Second Circuit affirmed the denial on the ground that the Association lacks standing. Once again, the court ignored the substantial economic injury which members of the Association have suffered as a direct consequence of defendants' exclusionary zoning practices and policies. Indeed, the uncontradicted affidavit submitted in support of the motion to intervene states that members of the Association have been unable to construct low and moderate income housing in Penfield as a result of the zoning ordinance and defendants' administration of that law:

> "The Rochester Home Builders Association alleges that they have been subject to the same discriminatory and exclusionary zoning practices as alleged in Plaintiffs' Complaint, and as a result thereof have been unable to construct housing and provide same for all of the metropolitan Rochester area population which is entitled to the opportunity to purchase such housing, *and that specifically members of the Rochester Home Builders Association have been denied relief from such zoning ordinances permitting them to construct such housing.*" (emphasis added).[14]

The Association specifically alleges that Penfield's restrictive zoning ordinance and defendant's implementation of the law has prevented, and continues to prevent, members of the Association from developing, selling and renting housing to all the members of the metropolitan Rochester area which might require low and moderate income housing. As a result, members of this organization are being deprived of substantial business opportunities and profits and have suffered damage in the amount

[14] Affidavit of Sanford Liebschutz, Esq., at paragraph 3.

of $750,000.00. Petitioners submit that it is difficult, indeed, to imagine a party with a greater economic stake in the outcome of this litigation than the Rochester Homebuilders Association, Inc. and its members.

Similarly, Metro-Act of Rochester, Inc., and its members have suffered direct injury as a result of defendants' practices and policies and, consequently, have a personal stake in the resolution of this matter. Metro-Act, a nonprofit corporation, was founded in 1964, after the riots in the decaying inner city of Rochester, and is now composed of approximately 350 individual members. One of its primary purposes is to pursue activities designed to secure open housing in the Rochester suburbs. Specifically, Metro-Act, has presented the Town of Penfield with a number of proposals to end the racially exclusionary zoning practices and policies existing in Penfield. Robert Warth, President of Metro-Act in 1971-72, commented on defendants' unwillingness to consider such proposals:

> "After making such a tremendous effort to discuss the Penfield housing problems with the Town Board officials and meeting with an attitude of unwillingness on the part of the Town of Penfield officials to consider Metro Act's proposals or even to meet and discuss the proposals, Metro Act members had the clear impression that the objective of the Town of Penfield was to delay indefinitely any real meeting with Metro Act members or a real consideration of the Metro Act proposal. Under the circumstances, there was no other alternative than to initiate this lawsuit."[15]

As a result of the exclusionary zoning ordinance and defendants' administration of the law, Metro-Act members are suffering direct injury in that they are losing the benefits of living in an integrated community. As Mr. Warth stated, "Metro-Act is working for open housing in the suburbs because, in part, only by providing maximum choice in housing can

[15]Affidavit of Robert Warth, at paragraph 14.

Metro-Act members and their children be spared an eventual repeat of ghetto confrontations and riots .... Metro-Act members believe that it is to their own children's benefit to learn early in life to come to healthy terms with different races and ethnic groups."[16] Although this injury inflicted upon Metro-Act members is not economic, it nevertheless is such a real and concrete harm, resulting directly from defendants' illegal practices and policies, as to ensure the requisite adverseness.

Finally, Housing Council in the Monroe County Area, Inc., has standing to assert that it and its members are adversely affected by defendants' exclusionary and socially discriminatory zoning practices and policies. The Housing Council is a nonprofit corporation which was organized in response to a recommendation contained in a 1970 study prepared by the Rochester Center for Governmental and Community Research and entitled "Housing in Monroe County, New York." This study was prepared for the Metropolitan Housing Committee, which was appointed jointly by the City and County Managers under authorization from the Rochester City Council and the Monroe County Board of Supervisors. The study recommended, *inter alia*, that a housing council be established, composed of representatives of relevant agencies, institutions and groups interested in housing in order to channel the fragmented and uncoordinated housing efforts in the community into meaningful action. Accordingly, the Housing Council's purposes, as stated in its constitution, include the following:

> "The Corporation shall be organized and operated exclusively for the purpose of receiving, maintaining, or administering one or more funds of real or personal property, or both, and using and applying the whole or any part of the income and principal thereof for the charitable purpose of combating community deterioration, eliminating racial and economic prejudice

[16]Id., at paragraph 6.

and discrimination in housing, and lessening the burdens of government in the Monroe County area of New York . . ."[17]

The Housing Council's membership is comprised of seventy-one (71) public and private organizations which are actively participating in efforts to eliminate racial and economic discrimination in the housing market. At least seventeen (17) of the charter member groups have been involved, are involved, or hope to be involved directly in the development and construction of low and moderate income housing. Indeed, at least one such group, Penfield Better Homes Corporation, has been actively attempting to develop moderate income housing in the Town of Penfield, but has been stymied by its inability to secure the necessary approvals from the defendants in this action. Moreover, several of the charter member groups, including the Monroe County Department of Social Services, the City of Rochester's Department of Urban Renewal and Economic Development, and the Urban Renewal Agency, are government agencies which have a direct concern with and interest in the production of adequate, multiracial, low and moderate income housing in the metropolitan Rochester area.[18]

Petitioner, Housing Council, urges that Penfield's restrictive zoning ordinance and defendants' illegal actions are thwarting the efforts of the organization and its members to achieve the stated purposes and undertake activities to eliminate racial and economic prejudice and discrimination in the housing market in the metropolitan Rochester area. The Housing Council is not simply using this lawsuit as "a vehicle for the vindication of the value interests of concerned bystanders."[19] Rather, the

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[17] Affidavit of John Mitchell, Executive Director of the Housing Council in the Monroe County Area, Inc., at paragraph 4.

[18] Id., at paragraphs 5-8.

[19] *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2416 (1973).

organization, is asserting that the challenged zoning law and defendants' actions are inflicting harm on the Housing Council, itself, and its members. Indeed, defendants are preventing the Council and its members from pursuing specific activities designed to further the organization's purpose of receiving and administering funds of real or personal property and using the income and principal thereof to combat community deterioration and eliminate discrimination in the housing market.

Petitioners submit that each and every plaintiff in this action is suffering actual injury as a result of Penfield's restrictive zoning ordinance and defendants' practices and policies in administering that law. In these circumstances, each plaintiff has a sufficient stake in the outcome of this litigation to guarantee that the issues will be presented in an adversary context and in a form capable of judicial resolution.

Reasons for Granting the Writ of Certiorari

I.

The Decision Below is in Direct Conflict with Decisions of the Courts of Appeals of the Third, Fifth, Eighth, and Tenth Circuits.

The Second Circuit's determination that petitioners lack standing to challenge defendants' exclusionary and racially discriminatory zoning practices and policies is contrary to the decisions of other federal Courts of Appeals.

The issue confronting the Eighth Circuit in *Park View Heights Corporation v. City of Black Jack*, 467 F. 2d 1208 (8th Cir. 1972), was, as here, "the validity of a zoning ordinance which effectively prohibits the construction of multiracial, federally subsidized, moderate and low income housing . . . ." Id. at 1210. Plaintiffs, there, were two nonprofit corporations, the Inter-Religious Center for Urban Affairs, Inc. [hereinafter, ICUA] and Park View Heights Corporation, as well as eight

individuals. The individual plaintiffs were residents of the City of St. Louis who desired "to live in St. Louis County due to its better economic, educational and recreational environment but have been unable to find housing within an affordable price range." Id. at 1210 n.2 The District Court held that ICUA and Park View lack standing and that no case or controversy existed as between the individual plaintiffs and the defendants.

The Eighth Circuit, however, reversed this determination and concluded that plaintiffs have the requisite standing and that the issues are proper for judicial resolution. That court noted that the organizational plaintiffs have standing, on behalf of themselves and the individuals who might reside in the housing units, "to question whether the purpose and effect of the ordinance is to exclude low and moderate income individuals from the City of Black Jack . . ." Id. at 1212. Moreover the court underscored the injury to the individual plaintiffs:

> "The statistics cited by the plaintiffs indicate a great need to provide low and moderate income housing in the suburban areas, a need which Park View and ICUA are trying to fill. Any attempt to interfere with this program may work a visible and immediate hardship on the class of low and moderate income citizens of the City of St. Louis"

Id. at 1216.

Similarly the Fifth Circuit has held that potential residents of low and moderate income housing have standing to challenge the exclusion of such housing units. Individual plaintiffs in *Crow v. Brown*, 332 F. Supp. 382, 390 (N.D. Ga. 1971), contended "that they are being denied access to low rent public housing outside the racially concentrated areas of Fulton County due to the arbitrary action and thoughtless inaction of the County . . . ." The Fifth Circuit rejected the suggestion that the parties lack the requisite injury which is necessary to ensure that the issues will be presented in an adversary context. *Crow v. Brown*, 457 F. 2d 788, 790 (5th Cir. 1972). See also, *United*

Farmworkers of Florida Housing Project, Inc., v. City of Delray Beach, 493 F. 2d 799 (5th Cir. 1974) (individual farmworkers have standing to challenge actions which have stymied efforts to build federally assisted low income housing and which have a racially discriminatory effect). Similarly, the Tenth Circuit in *Dailey v. City of Lawton*, 425 F. 2d 1037 (10th Cir. 1970), held that potential residents of low income housing have standing to challenge refusal to permit construction of such housing units.

In *Shannon v. United States Department of Housing and Urban Development*, 436 F. 2d 809 (3d Cir. 1970), the Third Circuit was presented with an analogous problem. There, plaintiffs were "white and black residents (some homeowners and some tenants), businessmen in, and representatives of private civic organizations in the East Popular Urban Renewal Area of Philadelphia." Id. at 811. They alleged that the placement of low and moderate income housing units on certain sites would have the effect of increasing the already high concentration of low income black persons. The court held that these plaintiffs have standing even though they were not potential residents of the housing units. The Third Circuit said, "The test, for Article III purposes, is whether or not plaintiffs allege injury in fact. They do indeed. They allege that concentration of low income residents in a 221(d)(3) rent supplement project in their neighborhood will adversely affect not only their investments in homes and businesses, but even the very quality of their daily lives." Id. at 818.

Petitioners submit that they, too, are injured by respondents' exclusionary and discriminatory zoning practices and policies. The Second Circuit, however, attempted to distinguish the instant case from these other decisions on the ground that they involved a particular housing proposal or project. The court stated, ". . . we note that the standing of potential residents in these cases presents an issue very different from the one presented here. The focusing of the controversy on a particular 'project assures 'concrete adverseness'." [20]

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20 *Warth v. Seldin*, supra at —, Appendix A, infra at 10.

Petitioners contend that such a distinction ignores the undisputed facts and is without merit. The underlying issue, here, involves both a zoning ordinance which prohibits multiracial low and moderate income housing units and official actions which have obstructed any attempt to build such housing. Members of Rochester Home Builders Association, Inc., have been unable to obtain the necessary relief from the zoning law to enable them to construct such housing units.[21] Metro-Act has submitted proposals which respondents have been unwilling to even consider.[22] Project proposals for construction of low and moderate income housing in Penfield have been stymied by respondents' practice of delaying action on proposals, denying approval for arbitrary reasons, failing to provide necessary support services, and amending the zoning ordinance to make approval virtually impossible.[23] In these circumstances, it would be anomolous, indeed, to deny petitioners standing to challenge Penfield's refusal to permit construction of low and moderate income housing on the ground that no such housing is presently being constructed in that Town.

Moreover, the fact that a particular project is under construction might ease plaintiffs' burden of showing the causal connection between defendants' actions and plaintiffs' injury. However, manifestly, it is not determinative of whether plaintiffs are actually suffering injury.

Accordingly, petitioners urge that this Court grant the Writ of Certiorari to resolve the conflict between the decision below and the decisions of the Third, Fifth, Eighth and Tenth Circuits.

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[21] See note 14, supra.

[22] See note 15, supra.

[23] See page 6, supra.

II.

The Decision Below is in Conflict With Applicable Decisions of the Supreme Court of The United States

The Second Circuit determined that the individual and organizational plaintiffs lack standing to challenge Penfield's exclusionary and discriminatory zoning ordinance and defendants' administration of that law. In so doing, the court said:

> "Although the Supreme Court has discussed standing to sue on many occasions, certain aspects of the doctrine continue to present difficulties. Moreover, during the last few years the Court has revolutionized the law of standing. In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins* 397 U.S. 159 (1970), the Court announced a two-pronged test of standing: the plaintiff must allege an "injury in fact," and must seek to protect an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Process, supra*, at 152-153. However, the Court has not explained what constitutes an "injury in fact." See Dugan, *Standing to Sue: A Commentary on Injury in Fact*, 22 Case W. Res. L. Rev. 256, 258 (1971)."[24]

Although the Second Circuit recognized that "certain aspects of the [standing] doctrine continue to present difficulties," that court chose to ignore this Court's recent discussion of this very doctrine in *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 93 S.Ct. 2405 (1973).

There, various environmental groups instituted an action challenging the decision by the Interstate Commerce Commission to permit railroads to file a surcharge on freight rates. The named plaintiffs included SCRAP, an unincorporated

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[24] *Warth v. Seldin*, supra at —, Appendix A, infra at 6.

association formed by five law students for the purpose of enhancing the quality of the human environment. The Association alleged that its members suffered economic, recreational, and aesthetic harm as a result of the rate increase. SCRAP maintained that each of its members was forced to pay more for finished products. Also, it was asserted that each of SCRAP's members uses the forests, rivers, streams and mountains and that such use would be adversely affected by the surcharge. Additionally, plaintiffs alleged that the rate increase resulted in increased air pollution. Finally, it was alleged that each member was "forced to pay increased taxes because of the sums which must be expended to dispose of otherwise reusable waste materials" Id. at 678, 93 S.Ct. at 2411.

The Court held that SCRAP had standing to challenge the surcharge. Mr. Justice Stewart[25] stated that "[i]n interpreting 'injury in fact' we made it clear that standing was not confined to those who could show 'economic harm' . . . ." Id. at 686, 93 S.Ct. at 2415. Moreover, the Court added, "we have already made it clear that standing is not to be denied simply because many people suffer the same harm." Id. at 687, 93 S.Ct. at 2416. Finally the Court rejected any notion that a party must show that it is "significantly" affected by the challenged action:

> "The Government urges us to limit standing to those who have been 'significantly' affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. 'Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved' and it serves to distinguish a person with a direct stake in the outcome of a litigation — even though small — from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no

[25]Mr. Justice Douglas and Mr. Justice Marshall joined in this part of the opinion of the Court. Mr. Justice Brennan and Mr. Justice Blackmun would hold that plaintiffs have standing even if they suffered no injury in fact.

> more at stake in the outcome of an action than a fraction of a vote. See Baker v. Carr., 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663; a five dollar fine and costs, see McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 303; and a $1.50 poll tax, Harper v. Virginia Bd. of Education, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169" Id. at 689 n. 14, 93 S.Ct. at 2417 n. 14.

Id. at 689 n. 14, 93 S.Ct. at 2417 n. 14.

Petitioners, here, urge that they are suffering injury which is no more remote or speculative than that suffered by the parties in *SCRAP*. Petitioners Warth, Reichert, Vinkey and Harris, allege — as did plaintiffs in *SCRAP* — that they are suffering economic injury in that they are forced to pay higher property taxes as a result of respondents' actions. Petitioner Ortiz, as a direct result of respondents' exclusionary zoning practices and policies, was forced to live forty-two miles from his place of work in Penfield and suffer burdensome commuting problems and cost. Respondents' exclusion of nonaffluent and nonwhite persons also inflicts injury upon petitioners Broadnax, Reyes and Sinkler. These persons and their families have been excluded from Penfield because of their race and income level and have been forced to reside in the decaying inner city environment which is characterized by dilapidated, sub-standard housing, uncontrolled violence and insufficient or nonexistent community services. Moreover, these petitioners are suffering the real harm of being unable to raise their children in an integrated community and obtain the benefits of the improved housing conditions and services in the suburban Town of Penfield.

Similarly, the organizational petitioners, here, as in *SCRAP*, are suffering actual injury as a result of the challenged policies and practices. Indeed, Rochester Home Builders Association, Inc., alleged that its members, who have constructed over 80% of the housing units in metropolitan Rochester area, are being deprived of substantial business opportunities and profits as a

result of respondents' exclusion of multiracial, low and moderate income housing. Manifestly, such economic injury is more substantial than the "identifiable trifle" which has been held to be enough to confer standing. Id. (quoting Davis, Standing: Taxpayers and Others, 35 U.Ch.L.Rev. 601, 613).

So too, respondents' exclusionary and racially discriminatory zoning practices and policies are inflicting harm upon Metro-Act of Rochester, Inc., and its members. The organization, which has presented specific proposals to respondents concerning the elimination of the exclusionary zoning practices, has been prevented from pursuing activities designed to secure open housing in the metropolitan Rochester area. Moreover, the members of Metro-Act are suffering direct injury in that they are losing the social benefits of living in the integrated community. Although such injury is not economic, it nevertheless is a real harm flowing directly from respondents' actions. Besides, as the Court said in *SCRAP*, "we made it clear that standing was not confined to those who could show 'economic harm.' " Id. at 686, 93 S.Ct. at 2415.

Finally, Housing Council in the Monroe County Area, Inc., is "injured in fact" by the Penfield zoning law and administration of that ordinance. This corporation was designed specifically for the purpose of receiving and administering funds or personal property for the purpose of combating community deterioration and eliminating racial and economic prejudice and discrimination in housing. The Housing Council and its members have been, and continue to be, prevented by defendants' actions from engaging in the necessary activities to further the purpose of receiving and administering such funds to eliminate discrimination in the housing market.

Petitioners contend that they are not simply concerned bystanders with a "mere interest in the problem." Id. at 689, n.14, 43 S.Ct. 2417 n.14. Rather, petitioners have a direct stake in the outcome of this litigation and, accordingly, have standing

under the principles enunciated in *SCRAP*.[26] Yet, the Second Circuit ignored the *SCRAP* decision and determined that petitioners are not injured in fact. Petitioners submit that the Second Circuit, in reaching this determination, did not concentrate solely on the existence of the harm, but rather erroneously focused on the difficulties petitioner might have in proving the causal relationship between respondents' actions and the alleged injury. The court said, for example, ". . . none of the named plaintiffs has suffered from any of the specific, overt acts alleged."[27] However, what this Court said in *SCRAP*, supra at 689-90, 93 S.Ct. at 2417, is equally applicable here:

> "If, as the railroads now assert, these allegations were, in fact, untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact. We cannot say on these pleadings that the appellees could not prove their allegations which, if proved, would place them squarely among those persons injured in fact by the Commission's action, and entitled under the clear import of *Sierra Club* to seek review." (footnote omitted)

Petitioners request that this Court grant the Writ of Certiorari to resolve the inconsistency between the Second Circuit's determination and this Court's decision in *SCRAP*.

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[26] The instant case is readily distinguishable from *United States v. Richardson*, — U.S. —; — S.Ct. — (1974) (42 U.S.L.W. 5076), and *Schlesinger v. Reservists Committee to Stop the War* — U.S. —; — S.Ct. — (1974) (42 U.S.L.W. 5088). Plaintiffs in those cases did not suffer the type of particularized concrete harm which has been inflicted upon petitioners here.

[27] *Warth v. Seldin*, supra at —, Appendix A, infra, at 11-12.

III.

The Decision Below Raises Significant and Recurring Questions of Federal Law Which Should Be Settled by this Court.

Congress has declared that the "general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing . . . and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family . . . ." 42 U.S.C. §1441. See also *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281, 89 S.Ct. 518, 525 (1969). Moreover, "by legislative act and judicial decision, this nation is committed to a policy of balanced and dispersed public housing . . . . Among other things, this reflects the recognition that in the area of public housing local authorities can no more confine low income blacks to a compacted and concentrated area than they can confine their children to segregated schools." *Crow v. Brown*, 332 F.Supp. 382, 390 (N.D. Ga. 1971), aff'd 457 F.2d 788 (5th Cir. 1972) (citations omitted) (footnote omitted).

Petitioners, here, seek to further these national housing goals and prohibit respondents from pursuing policies and practices which exclude multiracial, low and moderate income housing. As a result of these practices and policies, persons such as petitioners Sinkler, Broadnax and Reyes are being forced to live in substandard housing in the decaying inner city. Moreover, Penfield's exclusionary zoning ordinance and respondents' implementation of the ordinance are hastening the day when Rochester will become, in essence, a black city with a solid white perimeter. Accordingly, all petitioners are being deprived of the social benefits of living in an integrated community.

In *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 93 S.Ct. 364 (1972), plaintiffs sought to challenge defendants' racially discriminatory housing practices. Plaintiffs alleged that they had been injured in that

> "They — the two tenants — claimed they had been injured in that (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto'."

Id. at 208, 93 S.Ct. at 366 (footnote omitted). This Court held that plaintiffs had been injured by the "loss of important benefits from interracial associations" and, thus, had standing to challenge the discriminatory housing practices. Id. at 210, 93 S.Ct. at 367. Moreover, this Court said:

> "The dispute tendered by this complaint is presented in an adversary context. *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947. Injury is alleged with particularity, so there is not present the abstract question raising problems under Art. III of the Constitution. The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, 'the whole community,' 114 Cong. Rec. 2706, and as Senator Mondale who drafted §810(a) said, the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living quarters.' 114 Cong. Rec. 3472.

Id. at 211, 93 S.Ct. at 368.

This Court's resolution of the standing issue in *Trafficante* involved an interpretation of the Civil Rights Act of 1968, 42 U.S.C. §3610. Mr. Justice Douglas, writing for the Court, stated that it is unnecessary to reach the question of standing

under 42 U.S.C. § 1982. Id. at 209 n.8, 93 S.Ct. at 367 n.8. In view of this apparent limitation, the Second Circuit refused to apply the standing principles enunciated in *Trafficante* to the facts of the instant case.[28]

Petitioners submit that they, too, are suffering injury in fact due to the loss of benefits resulting from interracial associations and living in an integrated community. Accordingly, petitioners urge that this Court now hold that the standing requirements of *Trafficante* are equally applicable to this action under the Civil Rights Acts, 42 U.S.C. §§1981-1983. To hold otherwise would frustrate the national commitment to provide each American a decent home in a suitable, integrated living environment.

Petitioners pray that this court grant the Writ of Certiorari to resolve an important question of federal law and decide the issue which remains unsettled after *Trafficante*.

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[28] *Warth v. Seldin*, supra at —. Appendix A, infra, at 13.

CONCLUSION

The decision below is in conflict with decisions of this Court as well as Courts of Appeals in other circuits and raises significant and recurring questions of federal law. Accordingly, the Writ of Certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: July 12, 1974

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 139, 144—September Term 1973.

(Argued November 27, 1973 Decided April 18, 1974.)

Docket Nos. 73-1748
73-1749

ROBERT WARTH, Individually and on behalf of all other persons similarly situated, LYNN REICHERT, Individually and on behalf of all other persons similarly situated, VICTOR VINKEY, Individually and on behalf of all other persons similarly situated, KATHERINE HARRIS, Individually and on behalf of all other persons similarly situated, ANDELINO ORTIZ, Individually and on behalf of all other persons similarly situated, CLARA BROADNAX, Individually and on behalf of all other persons similarly situated, ANGELEA REYES, Individually and on behalf of all other persons similarly situated, ROSA SINKLER, Individually and on behalf of all other persons similarly situated, METRO-ACT OF ROCHESTER, INC.,

Plaintiffs-Appellants,

v.

IRA SELDIN, Chairman, JAMES O. HORNE, MALCOLM M. NULTON, ALBERT WOLF, JOHN BETLEM, as members of the Zoning Board of the Town of Penfield; GEORGE SHAW, Chairman, JAMES HARTMAN, JOHN D. WILLIAMS, RICHARD C. ADE, TIMOTHY WESTBROOK, as members of the Planning Board of the Town of Penfield; IRENE GOSSIN, Supervisor, FRANCIS J. PALLISCHECK, DR.

DONALD HARE, LINDSEY EMBREY, WALTER W. PETER, as members of the Town Board of the Town of Penfield, and the TOWN OF PENFIELD, NEW YORK,

Defendants-Appellees.

Before:

MOORE, HAYES and TIMBERS,

Circuit Judges.

Appeal from orders entered in the United States District Court for the Western District of New York, Harold P. Burke, *Judge*, granting motion to dismiss complaint for lack of standing and failure to state a claim upon which relief could be granted and denying motion of Rochester Homebuilders Association, Inc., to intervene as plaintiffs.

Affirmed.

EMMELYN LOGAN-BALDWIN, Rochester, New York (Frank A. Aloi, Robinson, Williams, Robinson & Angeloff, Rochester, New York, on the brief), *for Plaintiffs-Appellants Warth, Reichert, Vinkey, Harris, Ortiz, Broadnax, Reyes, Sinkler, and Metro-Act of Rochester, Inc.*,

MICHAEL NELSON and RICHARD WESLEY, on the brief, *for Plaintiff-Appellant Housing Council in the Monroe County Area, Inc.*,

SANFORD J. LIEBSCHUTZ, Rochester, New York (Liebschutz, Rosenbloom & Samloff, Rochester, New York, on the brief), *for Intervenor-Appellant Rochester Homebuilders Association, Inc.*,

DOUGLAS S. GATES, Rochester, New York (Harris, Beach & Wilcox, Rochester, New York, on the brief), *for Defendants-Appellees,*

THE NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING (Norman C. Amaker and Mollie W. Neal, Washington, D.C., on the brief), filed a brief as amicus curiae urging reversal.

HAYS, *Circuit Judge:*

Appellants brought this suit as a class action against the appellees, the Town of Penfield, New York, and the members of its Town Board, Town Planning Board, and Zoning Board. The complaint alleged that the town's zoning laws, on their face and as applied, violated appellants' rights under the first, ninth, and fourteenth amendments to the Constitution of the United States and 42 U.S.C. §§ 1981, 1982, and 1983. The district court dismissed the complaint for lack of standing and failure to state a claim upon which relief could be granted and denied appellants class action status. The court also denied a motion by the Rochester Homebuilders Association, Inc., to intervene as a plaintiff.

We affirm on the ground that appellants lack standing.

I. FACTS

Accepting appellants' factual allegations as true, as we must, we find the following facts relevant. The Town of Penfield is a suburb of Rochester. Its zoning laws are fairly typical for a suburban community. The town has zoned 90% of all vacant land for single family detached housing. The ordinance also fixes minimum lot sizes, floor areas, lot widths, and setbacks for dwellings. Where the ordinance

does permit multi-family dwellings, it limits density to twelve units per acre, limits the portion of the lot which may be occupied by the dwelling, and requires a minimum number of garage and unenclosed parking facilities for each unit.

The ordinance provides for Planned Unit Developments (PUD), which may contain a mixture of single-family and multi-family units. A substantial part of each PUD must be reserved for single-family dwellings with specified minimum acreages.

Appellants' complaint goes beyond the face of the town's zoning laws and further alleges certain affirmative acts which it claims deprived them of their rights. These acts involve various proposals by builders for multi-family housing in Penfield. One Joseph Audino on several occasions proposed a PUD for a site known as Beacon Hills. The Town Planning Board first denied the proposal, then accepted it with certain modifications which reduced the permissible density. The Town Board first accepted the proposal with the modifications, then rescinded the necessary rezoning. The town apparently claims that sewer facilities in the district are inadequate to serve the proposed development. The builder now plans to pump sewage to another district. Neither the builder nor anyone associated with him is a plaintiff in this action.

Penfield Better Homes, Inc., has proposed a project known as Highland Circle for "low moderate income housing." In September 1969 the Planning Board denied the proposal on a number of grounds. The corporation is not a plaintiff nor associated with any plaintiff in this action.[1]

1 Penfield Better Homes is a member of appellant Housing Council in the Monroe County Area, Inc. However, this does not suffice to give Housing Council standing. See discussion of Housing Council, infra. Appellants also allege that one director of Penfield Better Homes is a member of appellant Metro-Act of Rochester. This even more clearly fails to confer standing. See discussion of Metro-Act, infra.

A proposal by O'Brien Homes, Inc., to build apartment housing was originally denied. The Planning Board has yet to act on a modification of the same proposal.

Appellants also refer to several other proposals for apartment housing which have met with little success. They claim that only two proposals for PUDs have passed the first stage of the necessary three stages of approval. In no case do appellants allege any involvement in these proposals.

Appellants argue that the Penfield zoning laws, on their face and as applied, violate their rights in a number of ways. First, appellant taxpayers of Rochester claim that because of Penfield's zoning laws the City of Rochester must assume more than its "fair share" of low income, tax abated housing property, thereby shrinking Rochester's tax base and forcing property owners in Rochester to pay higher property taxes.[2] Second, appellants claim that Penfield's zoning practices unconstitutionally bar low and middle income persons, especially members of racial minority groups, from residing in Penfield.[3] Intervenor-appellant Rochester Homebuilders Association, Inc. claims that the town's zoning practices have deprived its members of the opportunity to construction housing for low and middle income persons, thereby harming the association's members financially.

Appellants seek a declaratory judgment that Penfield's zoning practices are illegal, an injunction against enforcing the zoning ordinance, an injunction compelling enactment of an acceptable ordinance, and monetary damages.

2 These appellants also claim that appellees deprive them of a fair share of their federal tax dollars by refusing to permit federally financed housing in the town.

3 Appellants also claim that appellees' practices violate their right to travel under the first, ninth, and fourteenth amendments and their right of peaceable assembly under the first and fourteenth amendments.

II. Standing

Although the Supreme Court has discussed standing to sue on many occasions, certain aspects of the doctrine continue to present difficulties. Moreover, during the last few years the Court has revolutionized the law of standing. In *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), and *Barlow* v. *Collins*, 397 U.S. 159 (1970), the Court announced a two-pronged test of standing: the plaintiff must allege an "injury in fact," and must seek to protect an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, supra, at 152-153. However, the Court has not explained what constitutes an "injury in fact." See Dugan, *Standing to Sue: A Commentary on Injury in Fact*, 22 Case W. Res. L. Rev. 256, 258 (1971). Moreover, reliance on precedents is especially hazardous in this area. As the Court remarked in *Data Processing*, "[g]eneralizations about standing to sue are largely worthless as such." 397 U.S. at 151. The Court has laid down some rules in certain areas, such as taxpayer, competitor, and environmental suits. Except for appellants who claim standing as taxpayers, however, these rules are not very helpful here.[4]

Standing is an element of justiciability, "surrounded by the same complexities and vagaries that inhere in justiciability." *Flast* v. *Cohen*, 392 U.S. 83, 98 (1968).

The gist of the question of standing is whether the plaintiff has "alleged such a personal stake in the outcome of

4 In *Data Processing* the Court acknowledged the limited authority of standing cases from one area in relation to cases in other areas:

> "*Flast* was a *taxpayer's* suit. The present is a *competitor's* suit. And while the two have the same Article III starting point, they do not necessarily track one another." 397 U.S. at 152 (emphasis in original).

the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). See also *O'Shea* v. *Littleton*, —— U.S. ——, 94 S. Ct. 669, 675 (1974); *Flast* v. *Cohen*, supra, at 99.

A. *Appellant Taxpayers of Rochester*

Appellants Vinkey, Reichert, Warth, and Harris own land within the city of Rochester. They claim that the Penfield zoning laws exclude low and moderate income persons, thereby requiring Rochester to permit more than its "fair share" of tax-abated housing projects. This shrinks the tax base of Rochester, which then must impose higher tax rates on appellants and others similarly situated in order to meet its fiscal needs.

As a general rule the interests of a federal taxpayer in federal expenditures are too "minute and indeterminable . . . fluctuating and uncertain" to provide a basis for standing. *Frothingham* v. *Mellon*, 262 U.S. 447, 487 (1923). The rule applies equally to state taxpayer suits in federal courts. *Doremus* v. *Board of Education*, 342 U.S. 429 (1952). In *Flast* v. *Cohen*, 392 U.S. 83 (1968), the Court created an exception to the rule: a federal taxpayer may contest measures alleged to violate "specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." Id. at 103.

Appellants do not allege a violation of a "specific constitutional limitation" on taxing and spending. Indeed, they do not even allege that Rochester's taxes or expenditures are unconstitutional. They allege only that certain acts of appellees which do not involve taxing or spending have operated to raise their taxes.

In *Flast* the Court stated that its decision was "consistent with the limitation upon state-taxpayer standing

in federal courts in *Doremus* . . . ." 392 U.S. at 102. Certainly if taxpayer standing was not justified in *Doremus* because plaintiff's interest was too remote, standing cannot be found here, where there is such an attenuated line of causation between the allegedly illegal acts (Penfield's zoning laws) and the injury of which appellants complain (higher property taxes). A great variety of actions taken by a state or a municipality might arguably affect the rate of taxation in other states or towns. This hardly gives taxpayers in the affected states or towns standing to contest all such actions.[5]

B. *Individual Appellants Claiming Standing on Other Grounds*

Appellants Broadnax, Sinkler, and Reyes are blacks and Puerto Ricans of low income who reside in Rochester. Each has sought but failed to obtain housing in Penfield. They allege that Penfield's zoning laws effectively bar low income housing within the town and therefore exclude them and persons similarly situated from living in Penfield. Appellant Ortiz lives in Wayland, New York, and works in Penfield. He makes the same allegations as appellants Broadnax, Sinkler and Reyes, and in addition claims as injury the commuting expenses he incurs because he cannot live in Penfield.

None of the appellants claims that anyone has refused to sell or lease housing or property to him. Indeed, appellants concede that they cannot afford any existing housing within the town. They do not claim to have any interest in land within the town or any connection with any plan to construct housing for them within the town.

5 Appellants also base a claim of standing on their status as federal taxpayers. See note 2, supra. This claim does not attack a spending measure of Congress and is not based on a specific constitutional limitation on spending. The claim therefore fails.

The Supreme Court has not established guidelines as to what constitutes an injury in fact for purposes of standing in this area. Nor have the lower federal courts, in this circuit or otherwise, considered the specific issue raised here. Appellants cite several federal cases in which a party was held to have standing to challenge zoning on civil rights grounds. In most of these cases the party attacking zoning had an interest in land.[6] A few cases in other circuits have taken a short step beyond this. In *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972), and *Dailey* v. *City of Lawton*, 425 F.2d 1037 (10th Cir. 1970), developers contested zoning which

6 In *Kennedy Park Homes Ass'n, Inc.* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971), the Diocese of Buffalo had committed itself to sell thirty acres of land it owned in Lackawanna to Kennedy Park Homes for low-income housing. Both the Diocese and the Association clearly had an interest in land.

In *Township of River Vale* v. *Town of Orangetown*, 403 F.2d 684 (2d Cir. 1968), this court held that plaintiff town had standing to sue defendant town which had rezoned property adjoining plaintiff on the allegation that the zoning was arbitrary and capricious and would injure plaintiff by reducing its revenues. We held that plaintiff need not be a resident of the town whose zoning practices were challenged. Id. at 686. We did not abandon the requirement, which plaintiff clearly met, that a party have a personal stake in the outcome. The holding reflects the obvious point that landowners may be affected by the zoning of adjoining properties, and that this interest suffices to confer standing. Cf. 3 K.C. Davis, Administrative Law Treatise § 22.16 at 283 (1958).

Neither *Boraas* v. *Village of Belle Terre*, 476 F.2d 806 (2d Cir.), prob. juris. noted, 94 S. Ct. 234 (1973), nor *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968), involved the kind of standing issue presented here. In *Boraas* we granted standing to unrelated persons living together in an apartment to challenge an ordinance limiting the right of unrelated persons to live in the same dwelling. In *Norwalk CORE* persons displaced by urban renewal had standing to challenge the city's procedures in relocating them. In each case plaintiff's personal stake was clear.

In most of the civil rights challenges to zoning in other circuits plaintiffs also had some interest in land sufficient to warrant standing. See *Southern Alameda Spanish Speaking Org.* v. *City of Union City*, 424 F.2d 291 (9th Cir. 1970); *Sisters of Providence* v. *City of Evanston*, 335 F. Supp. 396 (N.D. Ill. 1971); *Crow* v. *Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (1972) (per curiam).

prevented them from building low income housing projects on parcels of land which they owned. In both cases the court permitted potential residents of the proposed projects to join as plaintiffs. Without deciding whether we approve these holdings, we note that the standing of potential residents in these cases presents an issue very different from the one presented here. The focusing of the controversy on a particular project asures "concrete adverseness." The concrete possibility of obtaining new and better housing gives potential residents a personal stake in the outcome. The relief requested is not hypothetical.

The requirement of standing helps to insure that "the questions will be framed with the necessary specificity . . . to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *Flast* v. *Cohen*, 392 U.S. 83, 106 (1968). See also *Barlow* v. *Collins*, 397 U.S. 159, 167, 171 (1970) (Brennan, *J.*, concurring). In the instant case appellants cannot establish this specificity and the necessary "concrete adverseness."

The doctrine of standing also turns on whether the party in question has a "personal stake in the outcome of the controversy." *O'Shea* v. *Littleton*, —— U.S. ——, ——, 96 S. Ct. 669, 675 (1974); *Sierra Club* v. *Morton*, 405 U.S. 727, 732 (1972); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Appellants lack such a personal stake. The essence of their complaint is that the zoning practices of the appellees are unfair. However true that charge may be, absent a showing that appellants themselves have suffered from these practices they lack standing to challenge them. Their dispute with appellees reflects primarily a political disgruntlement. They indicate no benefit which a judgment favorable to them would produce. They allege neither

capability nor intent to construct housing for themselves on any land which the court might order rezoned as an element of relief.

Indeed, appellants' prayer for relief demonstrates their lack of personal stake in the outcome and their lack of standing. They request equitable relief in the form of a declaration that the Penfield zoning ordinance is unconstitutional, an injunction against enforcing it, and an injunction requiring enactment of a new ordinance. Granting this relief would not clear roadblocks to currently planned housing which appellants hope to occupy. It would not benefit appellants in any way in the foreseeable future. The prayer for relief also illustrates the lack of specificity. Appellants request neither zoning of any particular parcels nor approval of any specific projects.

In *O'Shea* v. *Littleton*, —— U.S. ——, 94 S. Ct. 669 (1974), plaintiffs brought suit alleging that defendants, various judicial and law enforcement officials of Alexander County, Illinois, were administering the county's criminal justice system in a discriminatory manner so as to deprive all black and some white citizens of a variety of constitutional rights. The Supreme Court held that plaintiffs had failed to state an Article III case or controversy. 94 S. Ct. at 675. The Court's opinion noted that the complaint "allege[d] injury in only the most general terms" and that "[n]one of the named plaintiffs is identified as having himself suffered any injury in the manner specified." Id. at 676. The threat of injury to the named plaintiffs was too "abstract," "conjectural," and "hypothetical" to give them a "personal stake in the outcome." Id. at 675.

Here we have a similar case. Appellants alleged that appellees' zoning practices deprive low income minority groups of equal protection. However, none of the named plaintiffs has suffered from any of the specific, overt acts

alleged. Thus appellants' personal connection with these practices is too abstract, conjectural, and hypothetical to establish an Article III case or controversy.

C. *Metro-Act of Rochester, Inc.*

Appellant Metro-Act of Rochester, Inc., is a non-profit corporation whose main purpose is "to alert ordinary citizens to problems of social concern." Low income housing is one area to which the organization has directed its attention. Appellant claims standing on a number of grounds, none of which is adequate.

First, appellant claims standing because of its "special interest" in housing matters. The Supreme Court's decision in *Sierra Club* v. *Morton*, 405 U.S. 727, 735-40 (1972), rejected this as a basis for standing.

Second, Metro-Act claims standing as a taxpayer of the city of Rochester. This approach fails for the same reasons stated above with respect to individual taxpayer appellants.

Third, appellant claims standing as representative of its low income members who seek housing in Penfield. Since we have decided that these individuals lack standing, the organization cannot derive standing from them.

Fourth, Metro-Act claims standing on the ground that one director of Penfield Better Homes is one of its members. We have decided that membership of Penfield Better Homes in Housing Council does not suffice to confer standing. (See discussion, infra.) It follows that membership of a director in Metro-Act certainly cannot confer standing.

Finally, relying on *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), Metro-Act claims standing as representative of its members who live in Penfield.[7] In *Trafficante* the plaintiffs, tenants of an apartment complex, challenged the allegedly discriminatory rental practices of their landlord. They claimed as injury the loss of social, business, and professional benefits of living in an integrated community and embarrassment of being stigmatized as living in a "white ghetto." They based their claim of standing on section 810(a) of the Civil Rights Act of 1968, 42 U.S.C. § 3610(a), which gives standing to "[a]ny person who claims to have been injured by a discriminatory housing practice . . . ." The Supreme Court held that plaintiffs had standing.

Trafficante is distinguishable from the present case. We have emphasized that generalizations about standing are largely useless. This is especially true of a case which focused on the peculiarities of one piece of legislation. The Court in *Trafficante* looked to the legislative history and administrative interpretation of section 810(a). 409 U.S. at 210. The Court also considered the practical difficulties of enforcing the Act and concluded that Congress must have intended persons in plaintiffs' position to be able to sue as private attorneys-general. Metro-Act has presented us with no similar factors in this case.

The concurring opinion of Justice White, joined by Justices Blackmun and Powell, further suggests that the holding of *Trafficante* should apply only to cases under the Civil Rights Act of 1968. Justice White expressed doubt that, in the absence of section 810(a), the suit would present an Article III case or controversy. 409 U.S. at 212. The six remaining justices explicitly declined to consider

7 Appellants' complaint did not include residents of the Town of Penfield as a class which they purported to represent. Metro-Act has, however, made this claim on appeal.

whether plaintiff might also have standing under 42 U.S.C. § 1982. 409 U.S. at 209 n.8. The reasoning of the majority opinion and the explicit statement of the three concurring justices strongly indicate that a majority of the Court would not find standing for Metro-Act on this basis.

D. *Housing Council in the Monroe County Area, Inc.*

Housing Council in the Monroe County Area, Inc., is a non-profit corporation whose purpose is to "combat community deterioration through the elimination of racial and economic discrimination in housing." Its membership includes public and private agencies and organizations seeking to improve the housing of persons of low and moderate income. Plaintiffs below moved to add Housing Council as a party plaintiff. The district court held that Housing Council lacked standing. We agree.

Housing Council alleges no injury in fact to itself. To the extent that it bases standing on representation of various groups of residents in the metropolitan Rochester area, its claim fails for the same reasons given in our discussion of other appellants.

Housing Council also claims standing because Penfield Better Homes Corp., one of its members, has been denied approval of a specific housing project proposal. We note first that if this allegation conferred standing on appellant it would confer only that standing which its member would have had. Housing Council has not indicated that it limits its suit to the dispute over the proposal of Penfield Better Homes. Rather it joins in the more general and abstract claims of other appellants.

We think that Housing Council lacks standing to vindicate even the more limited claims which Penfield Better Homes might have against appellees. It is highly doubtful that an organization has standing to represent its members in most cases under the Civil Rights Act. See *Aguayo* v. *Richardson*, 473 F.2d 1090, 1098-1101 (2d Cir. 1973), cert. denied, 94 S. Ct. 900 (1974). Certainly the special circumstances favoring organizational standing in cases like *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1958), and *NAACP* v. *Button*, 371 U.S. 415, 428-29 (1963), are absent here. Alleged specific harm is limited to a single member. There is no reason why Penfield Better Homes cannot assert its own rights as well as or better than Housing Council.

Housing Council therefore lacks standing.

E. *Rochester Homebuilders Association, Inc.*

Rochester Homebuilders Association, Inc., is a nonprofit trade association of persons and companies engaged in various phases of the residential construction industry in the metropolitan Rochester area. In the court below the association moved, pursuant to Fed. R. Civ. P. 24(b), to intervene as plaintiffs in this action. The district court denied the motion on the grounds that the association lacked standing and that its intervention would create undue delay or prejudice. We agree that the association lacked standing and do not reach the Rule 24(b) issue.

As we noted above, an organization may have standing to assert the rights of its members where there are special circumstances. The rule applies to trade associations as well as to other organizations. *National Motor Freight Traffic Ass'n* v. *United States*, 372 U.S. 246 (1963) (per curiam). We find no such special circumstances here.

Moreover, as we noted above with respect to appellant Housing Council, an organization seeking to assert rights of its members has only that standing which its members would have had. Rochester Homebuilders has not tied its claim of standing to specific acts of appellees which have

affected its members. Instead it makes the same claims as other appellants. The members of the association would not have standing to raise these claims. The association cannot derive such standing from them.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
Western District of New York

ROBERT WARTH, Individually and on behalf of all other persons similarly situated, LYNN REICHERT, Individually and on behalf of all other persons similarly situated, VICTOR VINKE, Individually and on behalf of all other persons similarly situated, KATHARINE HARRIS, Individually and on behalf of all other persons similarly situated, ANDELINO ORTIZ, Individually and on behalf of all other persons similarly situated, CLARA BROADNAX, Individually and on behalf of all other persons similarly situated, ANGELEA REYES, Individually and on behalf of all other persons similarly situated, ROSA SINKLER, Individually and on behalf of all other persons similarly situated, METRO-ACT OF ROCHESTER, INC.,

Plaintiffs

vs.

IRA SELDIN, Chairman, JAMES O. HORNE, MALCOLM M. NULTON, ALBERT WOLF, JOHN BETLEM, as members of the Zoning Board of the Town of Penfield; GEORGE SHAW, Chariman, JAMES HARTMAN, JOHN D. WILLIAMS, RICHARD C. ADE, TIMOTHY WESTBROOK, as members of the Planning Board of the Town of Penfield; IRENE GOSSIN, Supervisor, FRANCIS J. PALLISCHECK, DR. DONALD HARE, LINDSEY EMBREY, WALTER W. PETER, as members of the Town Board of the Town of Penfield, and the TOWN OF PENFIELD, NEW YORK,

Defendants

CIVIL 1972-42

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Rochester, N.Y. 14614
Attorneys for plaintiffs
(Frank A. Alor & Emmelyn Logan-Baldwin, of counsel)

Andrew V. Siracuse, Esq.
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Attorney for defendants
(Harris, Beach & Wilcox, and James M. Hartman, of counsel)

Sanford J. Liebschutz, Esq.
101 Powers Building
Rochester, N.Y. 14614
Attorney for Rochester Home Builders Association, Inc.

This is an action wherein the plaintiffs seek a declaratory judgment adjudging that the Town of Penfield Zoning Ordinance is unconstitutional and in other respects illegal; they seek to enjoin its administration and a judgment awarding damages, both compensatory and exemplary.

By notice of motion with attached affidavit filed April 6, 1972, James M. Hartman as a member of the firm of Harris, Beach & Wilcox, counsel to Andrew V. Siracuse, attorney for defendants, moves to dismiss the complaint on grounds specifically stated and, in the alternative, for an order for a more definite statement and for an order determining that the action has been improperly instituted as a class action. The motion was argued orally and the respective parties have filed written memoranda in support of their positions.

The plaintiffs Warth, Vinkey, Reichert and Harris, property owners and taxpayers of the City of Rochester, have suffered no measurable or particular direct financial injury occasioned by

the activities complained of. These plaintiffs are not taxpayers of the Town of Penfield. They are not attacking a spending measure of the Town of Penfield. The alleged causal connection between Penfield's zoning laws and the resulting tax burden on residents of Rochester is speculative, remote and indirect. They have no standing to sue. Doremus vs. Board of Education, 342 U.S. 429.

The plaintiffs Ortiz, Broadnax, Reyes and Sinkler have alleged no injury suffered as a result of the Penfield Zoning Ordinance or its administration. These plaintiffs have asserted no provision of the Penfield zoning ordinance nor any act of any defendant which violates the constitution or any federal statute. They have set forth no injury in fact. They have shown no connection between their grievances and the Penfield zoning ordinance or its administration. They have no standing to sue. Data Processing Service, Inc. vs. Camp. 397 U.S. 150.

The plaintiff Metro-Act of Rochester has alleged no facts to show its standing to sue. Sierra Club vs. Morton, 405 U.S. 727 (1972).

The plaintiffs have stated no claim or claims upon which relief can be granted under the equal protection clause or the due process clause of the Fourteenth Amendment. Euclid vs. Ambler Realty Co., 272 U.S. 365; Dandridge vs. Williams, 397 U.S. 471; James vs. Valtierra, 402 U.S. 137.

The plaintiffs have stated no claim or claims upon which relief can be granted under the First Amendment or the Ninth Amendment.

The plaintiffs have asserted no valid claim or claims for which relief can be granted under 42 U.S.C. Sections 1981, 1982 or 1983. They are not entitled to declaratory, injunctive, or monetary relief under those sections.

This suit should not be treated as a class action.

The plaintiffs have moved to add as a party plaintiff Housing Council in the Monroe County Area, Inc. Housing Council has no standing to sue. Sierra Club vs. Morton (supra).

Rochester Home Builders Association, Inc. has moved to intervene. This organization has no standing to sue. It has alleged no injury in fact. Even if it did have standing to sue, this court should, in the exercise of discretion, deny intervention, because to allow intervention would unduly delay or prejudice the adjudication of the rights of the original parties and would confuse the trial with collateral issues. Accordingly it is hereby

ORDERED that plaintiffs' motion to add as a party plaintiff Housing Council in the Monroe County Area, Inc., is denied. The motion of Rochester Home Builders Association, Inc. to intervene is denied. This action was improperly instituted as a class action. The complaint is dismissed for the reasons herein stated, with costs.

/s/ HAROLD P. BURKE
United States District Judge

December 27, 1972.

APPENDIX C

Constitutional and Statutory Provisions

A. *Constitutional Provisions*

1. The First Amendment provides:

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Ninth Amendment provides:

   The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

3. The first section of the Fourteenth Amendment provides:

   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . .

B. *Statutory Provisions*

1. 42 U.S.C. § 1981 provides:

   All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. 42 U.S.C. § 1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

3. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX D

§ 29-8. Residential AA District.

a. USES. No structure shall be erected, structurally altered, reconstructed or moved and no structure, land or premises shall be used in any district designated on the Official Zoning Map of the Town of Penfield as a Residential "AA" District except for one or more of the following purposes:

1. One family dwelling.
2. Churches and similar places of worship.
3. Elementary, high schools, colleges, universities, public parks and public playgrounds.

4. Boarders and lodgers not to exceed two (2) in a one-family dwelling.

5. Customary agricultural operations, as the same are herein defined, but excluding within one hundred (100) feet of any lot line, any housing of poultry or stabling of livestock or storage of manure or other odor or dust-producing material.

6. Public library.

7. Municipal buildings or structures (including town, school and improvement or fire district).

b. ACCESSORY USES. The following accessory uses are permitted in a Residential "AA" District when located on the same lot with a permitted principal use:

1. Private garage, either attached or unattached to the principal structure.

2. Professional offices (when part of the personal residence of and used solely by professional persons) and customary home occupations conducted by the resident only and conducted in the principal building only. There shall be no evidence of such use other than an announcement or sign not to exceed two (2) square feet in area. Exterior alterations to the residence or principal building which change the essential character thereof for such use are prohibited.

3. **[Added 12-21-71, effective 1-10-72]** One (1) detached garage incorporating a single apartment overhead (carriage house), provided the following criteria are satisfied:

   (a) A maximum of two (2) bedrooms.

   (b) A minimum of six hundred (600) square feet of living area in a two-bedroom apartment.

   (c) A minimum of five hundred (500) square feet of living area in a one-bedroom apartment.

   (d) Minimum lot size of three (3) acres.

   (e) The owner of the lot resides thereon.

   (f) An independent private septic system approved by the appropriate health authorities, unless public sanitary sewers are available.

c. AREA OF STRUCTURES. No one-story residential structure shall be hereafter erected unless it shall contain an habitable area exclusive of open porch or attached garage, of not less than one thousand three hundred (1,300) square feet; no one-and-one-half-story residence or split level residential structure shall be hereafter erected unless it shall contain an habitable area exclusive of open porch or attached garage of not less than one thousand four hundred (1,400) square feet; and no two-story residential structure shall be hereafter erected unless it shall contain an habitable area exclusive of open porch or attached garage of not less than one thousand five hundred (1,500) square feet.

d. MINIMUM SIZE LOTS. No structure shall be erected on a lot other than a corner lot unless such lot shall have a width of at least one hundred (100) feet at the building line, an average depth of at least two hundred (200) feet, and a total ground area of not less than twenty thousand (20,000) square feet. Corner lots shall have a width of at least one hundred twenty-five (125) feet at the building line, an average depth of at least two hundred (200) feet, and a total ground area of not less than twenty-five thousand (25,000) square feet. This provision shall not apply to lots appearing on any subdivision plat heretofore approved nor to any existing lot of smaller size. In no case, however, shall the size of the lot be smaller than the area necessary, where needed, for adequate and sufficient individual sewage disposal and/or the safe location of a potable water well, where needed.

e. YARDS. No church, school, or other permitted structure designed for public assembly or open to the public, hereafter erected, structurally altered, reconstructed or moved in a Residential "AA" District shall be nearer to any street line than one hundred (100) feet, whether front or side, and no such structure shall be nearer than one hundred (100) feet to any interior or rear lot line. Every other permitted structure hereafter

erected, structurally altered, reconstructed or moved in such District shall be no nearer to any street line, whether front or side, than is provided under the provisions of § 29-10 of this ordinance, and no such structure shall be nearer than ten (10) feet to any interior side or rear lot line. The purpose of this provision is to establish suitable side and rear yards.

§ 29.9 Residential "A" District.

a. USES. No structure shall be erected, structurally altered, reconstructed or moved, and no structure, land or premises shall be used in any district designated on the Official Zoning Map of the Town of Penfield as a Residential "A" District except for one (1) or more of the following purposes:

1. All uses permitted in a Residential "AA" District, subject to all the use restrictions specified therefor in the provisions relating to said District.

2. Lodging or boardinghouses, where no more than four (4) persons are supplied with meals and/or lodging for hire. **[Amended 1-4-65]***

b. ACCESSORY USES. The following accessory uses are permitted in a Residential "A" District when located on the same lot with a permitted principal use:

1. Private garage, either attached or unattached to the principal structure.

2. Professional offices (when part of the personal residence of and used solely by professional persons) and customary home occupations conducted by the resident only and conducted in the principal building only. There shall be no evidence of such use other than an announcement or sign not to exceed two (2) square feet in area. Exterior alterations to the residence or principal building which change the essential character thereof for such use are prohibited.

* **Editor's Note: Amendment repealed 2 and renumbered this subsection from 3.**

3. **[Added 12-21-71, effective 1-10-72]** One (1) detached garage incorporating a single-apartment overhead (carriage house), provided the following criteria are satisfied:

   (a) A maximum of two (2) bedrooms.

   (b) A minimum of six hundred (600) square feet of living area in a two-bedroom apartment.

   (c) A minimum of five hundred (500) square feet of living area in a one-bedroom apartment.

   (d) Minimum lot size of two (2) acres.

   (e) The owner of the lot resides thereon.

   (f) An independent private septic system approved by the appropriate health authorities, unless public sanitary sewers are available.

c. AREA OF STRUCTURES. No one-story residential structure shall be hereafter erected unless it shall contain an habitable area exclusive of open porch or attached garage of not less than one thousand (1,000) square feet; no story-and-a-half or split level residential structure shall be hereafter erected unless it shall contain an habitable area exclusive of open porch or attached garage of not less than one thousand two hundred (1,200) square feet; and no two-story residential structure shall be hereafter erected unless it shall contain a habitable area exclusive of open porch or attached garage of not less than one thousand three hundred (1,300) square feet.** **[Amended 1-4-65]**

d. MINIMUM SIZE LOTS. No structure shall be erected on other than a corner lot unless such lot shall have a width of at least one hundred (100) feet at the building line, an average depth of at least one hundred fifty (150) feet, and a total ground area of not less than fifteen thousand (15,000) square feet. Corner lots shall have a width of at least one hundred twenty-five (125) feet at the building line, an average depth of at least one hundred fifty (150) feet, and a total ground area of not less than eighteen thousand seven hundred fifty (18,750) square feet. This provision

** **Editor's Note: Eliminated last sentence which referred to size requirements.**

shall not apply to lots appearing on any subdivision plat heretofore approved nor to any legally existing lot of smaller size. In no case, however, shall the size of the lot be smaller than the area necessary for adequate and sufficient individual sewage disposal, and the safe location of a potable water well, where needed.

e. YARDS. No structure hereafter erected, structurally altered, reconstructed or moved in a Residential "A" District shall be nearer to any street line, whether front or side, nor to any interior or rear lot line than is provided under the provisions of § 29-8e of this ordinance.

§ 29-10. Front yards — Residential Districts.

For the purpose of establishing suitable front yards, no structure hereafter erected, structurally altered, reconstructed or moved in any residential district, shall be nearer to the center line of any highway than herein provided:

1. One hundred eight (108) feet from the center line of the highway of the following streets and highways:

(Cont'd on page 2915)

Atlantic Avenue
Browncroft Boulevard
Carter Road
Fairport-Nine Mile Point Road
Five Mile Line Road
Penfield Road
Plank Road
Salt Road

2. **[Added 8-3-64]**. Ninety (90) feet from the center line of the highway of the following streets and highways:

Baird Road, south of Penfield Road
Bay Road
Creek Street
Huber Road
Harris Road
Jackson Road
State Road
Watson Road
Whalen Road

3. **[Added 8-3-64]**. Eighty-three (83) feet from the center line of the highway of any street or highway not hereinabove specifically set forth.

4. **[Added 8-3-64]**. Nothing in the foregoing shall prohibit the construction of an addition to a lawfully existing residence, provided that such addition shall not be constructed nearer the center line of the highway than the existing residence, and provided that such addition shall not be in violation of any side- or rear-line setback requirement imposed by this ordinance.

§ 29-11. Apartment House or Multiple Dwelling District.

A. USES. No structure shall be erected, structurally altered, reconstructed or moved, and no structure, land or premises shall be used in any district designated on the Official Amended Zoning Map of the Town of Penfield as an Apartment-House or Multiple-Dwelling District, except for apartment houses and multiple dwellings as defined in § 29-6, Paragraph 2 of this ordinance and such accessory structures as are customarily incident to and used in connection with such main structure.

B. AREA OF STRUCTURES: No apartment house or multiple dwelling, as herein defined, shall be hereafter erected, or existing structure altered or reconstructed to become such, unless each unit thereof shall contain the following minimum habitable area:

Studio apartment (no bedroom)	500 square feet
One-bedroom apartment	600 square feet
Two-bedroom apartment	800 square feet
Three-bedroom apartment	950 square feet

C. MINIMUM LOT SIZE: **[Amended 9-7-65]** Every lot in said district shall contain a minimum of three thousand five hundred (3,500) square feet for each apartment living unit to be erected thereon, shall be of such size that the horizontal area of any structure or group of structures to be erected, or as it or they shall exist after alteration or remodeling, shall not occupy more than twenty-five per centum (25%) of the area of the lot. The horizontal area shall be the area determined by projecting the extreme lines of the structure vertically to a horizontal plane. The horizontal area of a group of structures located on the same lot shall be the combined areas of all buildings comprising the group.

D. YARDS: No structure hereafter erected, structurally altered, reconstructed or moved in said district shall be nearer

to any street line than the height of the building or buildings, and in no event nearer than eighty (80) feet. No structure not in excess of three (3) stories in height shall be nearer than twenty (20) feet to any interior side or rear lot line. No structure from four (4) to six (6) stories in height, inclusive, shall be nearer than thirty (30) feet to any interior side or rear lot line, and no structure seven (7) stories or more in height shall be nearer than forty (40) feet to any interior side or rear lot line. Where the rear or side lot line abuts any lot or land area in a residential district, such structure shall not be located closer than one hundred (100) feet from the line adjoining said residential district, and a fifty-foot strip immediately adjoining said residential district shall be maintained as a landscape buffer area. **[Amended 8-3-64]**

E. Off-street parking. All premises occupied by apartment houses or multiple dwellings in this district shall provide and maintain at the site of such structures and completely off the limit of any street or highway an improved and usable parking area of sufficient size to provide one and one-half (1½) parking spaces for each apartment or living unit to be contained in such structure, of which requirement one (1) such parking space per apartment or living unit shall be within an enclosed garage. All unenclosed parking areas shall be screened from adjacent properties.

§ 29-11.1. Townhouse Dwelling District. [Added 6-2-69]

A. Definition. Townhouses are defined as buildings or dwelling groups containing individual single-family units permitting separation of such family groups by a party wall. **[Amended 8-7-72, effective 8-28-72]**

B. Uses. No structure shall be erected, structurally altered, reconstructed or moved and no structure, land or premises shall be used in any district designated on the Official Amended Zoning Map of the Town of Penfield as a Townhouse Dwelling District, except for townhouses as herein defined and such accessory structures as are herein enumerated.

C. Townhouses. No townhouse or clusters of townhouses as herein defined shall be hereafter erected or existing structures altered or reconstructed to become such except in accordance with the following criteria:

1. Density limitation. The overall density shall not exceed nine (9) dwelling units per acre.

2. Area requirements.

   a) Lot size. No dwelling shall be erected on a parcel of land that has less than eighteen (18) feet of frontage. **[Amended 3-5-73, effective 5-26-73]**

   b) Front yard setbacks. No building or part thereof shall be erected or altered in this district that is nearer the private street center line upon which it fronts than forty-five (45) feet.
   No building or part thereof shall be erected or altered in this district that is nearer than sixty (60) feet to the center line of a public or dedicated road upon which it fronts.
   If any building erected in this district faces a public or dedicated road the opposite side of which is either an AA or A Residential District, the front yard setback shall be that which is required by the Residential District.

   c) Side yard setbacks. A side yard setback of thirty-five (35) feet is required from the center line of a private road on each corner lot and sixty (60) feet from the center line of a public road or dedicated road. No side yards shall be required of interior lots having a common wall. A side yard setback of at least equal to the height of the highest adjacent building and no less than twenty (20) feet shall be required between building groups.

   d) Rear setback. A setback of at least thirty (30) feet from any other structure or any external boundary line is required on each lot.

3. Height limitations. No building shall exceed two and one-half (2½) stories nor shall any building exceed thirty-five (35) feet in height, except for permitted accessory structures as approved by the Planning Board as hereinafter provided.

4. Parking requirements. A minimum of two (2) parking spaces shall be provided for each dwelling unit, one (1) of which shall be completely enclosed and covered.

5. Specific requirements.

   a) Unit size. No townhouse dwelling unit shall be constructed, altered or reconstructed unless it shall contain a minimum of one thousand (1,000) square feet of habitable area and be not less than eighteen (18) feet in width. **[Amended 8-7-72, effective 8-28-72]**

   b) There shall be no more than eight (8) individual townhouse units within each building or dwelling group.

   c) The main structures and all accessory buildings shall not occupy more than twenty-seven percent (27%) of the gross acreage as shown on the site plan.

6. Permitted accessory structures and uses. The following accessory uses and structures are permitted subject to the approval by the Planning Board of the site plan and as hereinafter provided:

   a) Private garages.

   b) Group swimming pools, subject to provisions of § 29-20.1 of this ordinance, except that any pool proposed as an integral part of a townhouse project may be approved and a permit issued by the Planning Board as a part of its site plan approval.

   c) Parks, playgrounds and play areas to include structural facilities incidental to recreational areas, such as rest rooms, bathhouses and clubhouses, which facilities are limited to those that are publicly owned or operated not for profit for the benefit of the townhouse owners of the district or a part thereof.

   d) Maintenance buildings.

7. Site plan requirements. The site plan submitted for review, pursuant to § 29-15, Paragraph 11, of this ordinance, shall include the following items:

   a) Topography, including existing and proposed contours.

   b) Proposed street system for both public and private streets.

c) Proposed reservation for parks, playgrounds, recreational areas and other open spaces.

d) Off-street parking spaces.

e) Types of dwellings and portions of the area proposed therefor.

f) Locations of all structures and parking spaces, including number of parking spaces.

g) A tabulation of the total number of acres in the proposed project and a percentage thereof designated for the proposed dwelling types, and total ground coverage.

h) A tabulation of overall density per gross acres.

i) Preliminary plans and elevations of the several dwelling types.

(Cont'd on page 2916.5)

j) Location and size of driveways.

k) Type and location, size and number of all plantings

l) All grassed areas.

m) All sidewalk areas.

n) Type and size of fences or hedges.

o) Design of the proposed buildings including types of finishes on exteriors.

p) Provisions for disposal of rubbish.

q) Location of all buildings on site to include distance from lot lines.

r) Location and sizes of signs, if any.

s) Exterior lighting, if any.

§ 29-11.20. Planned Unit Development District. [Added 6-1-70; effective 6-21-70]

A. Intent. It is the intent of the Planned Unit Development (PUD) Article (§§ 29-11.20 through 29-11.25) to provide flexible land use and design regulations through the use of performance criteria so that small- to large-scale neighborhoods or portions thereof may be developed within the town that incorporate a variety of residential types and nonresidential uses, and contain both individual building sites and common property which are planned and developed as a unit. Such a planned unit is to be designed and organized so as to be capable of satisfactory use and operation as a separate entity without necessarily needing the participation of other building sites or other common property in order to function as a neighborhood. This Article specifically encourages inno-

vations in residential development so that the growing demands for housing at all economic levels may be met by greater variety in type, design and siting of dwellings and by the conservation and more efficient use of land in such developments.

This Article recognizes that the standard zoning function (use and bulk) and the subdivision function (platting and design) are appropriate for the regulation of land use in areas or neighborhoods that are already substantially developed, but that PUD techniques for land development may be more appropriate in areas of the town that are not already substantially developed. This Article recognizes that a rigid set of space requirements along with bulk and use specifications would frustrate the application of the PUD concept. Thus, where PUD techniques are deemed appropriate through the rezoning of land to a PUD District by the Town Board, the set of use and dimensional specifications elsewhere in this ordinance is herein replaced by approval process in which an approved plan becomes the basis for continuing land-use controls. Consequently, where the provisions of §§ 29-3, 29-8, 29-9, 29-10, 29-11, 29-11.1, 29-12, 29-15, 29-20 and 29-20.1 of the amended Zoning Ordinance are inconsistent with the provisions of this section, the provisions of this section shall prevail.

B. Objectives. In order to carry out the intent of this Article, a PUD shall achieve the following objectives:

(1) A maximum choice in the types of environment, occupancy tenure (e.g., cooperatives, individual ownership, condominium, leasing), types of housing, lot sizes and community facilities available to existing and potential town residents at all economic levels.

(2) More usable open space and recreation areas.

(3) More convenience in location of accessory commercial and service areas.

(4) The preservation of trees, outstanding natural topography and geologic features and prevention of soil erosion.

(5) A creative use of land and related physical development which allows an orderly transition of land from rural to urban uses.

(6) An efficient use of land resulting in smaller networks of utilities and streets and thereby lower housing costs.

(7) A development pattern in harmony with the objectives of the Master Plan.

(8) A more desirable environment than would be possible through the strict application of other Articles of this ordinance.

§ 29-11.21. General requirements for Planned Unit Developments. [Added 6-1-70; effective 6-21-70]

A. Minimum area. Under normal circumstances, the minimum area required to qualify for a PUD District shall be one hundred (100) contiguous acres of land. Where the applicant can demonstrate that the characteristics of his holdings will meet the objectives of this Article, the Planning Board may consider projects with less acreage.

B. Ownership. The tract of land for a project may be owned, leased or controlled either by a single person or corporation, or by a group of individuals or corporations. An application must be filed by the owner or jointly by owners of all property included in a project. In the case of multiple ownership, the Approved Plan shall be binding on all owners.

C. Location of PUD District. The PUD District shall be applicable to any area of the town where the applicant can

demonstrate that the characteristics of his holdings will meet the objectives of this Article.

D. Permitted uses. All uses within an area designated as a PUD District are determined by the provisions of this section and the approved plan of the project concerned.

(1) Residential uses. Residences may be of any variety of types. In developing a balanced community, the use of a variety of housing types shall be deemed most in keeping with this Article. To insure a variety of types of residences, to prevent overcrowding, to encourage adequate light and air space for fire protection, the following criteria shall be met:

(a) A minimum of ten percent (10%) by acreage shall contain single-family detached dwellings having the following minimum square feet of habitable area exclusive of open porch or attached garage:

1	story	1,300 square feet
1½	story	1,400 square feet
2	story	1,500 square feet

Side and rear setbacks shall conform to § 29-8 of this ordinance.

Average density shall not exceed two (2) dwelling units per acre.

(b) A minimum of fourteen percent (14%) by acreage shall contain single-family detached dwellings having the following square feet of habitable area exclusive of open porch or attached garage:

1	story	1,000 - 1,300 square feet
1½	story	1,200 - 1,400 square feet
2	story	1,300 - 1,500 square feet

Side and rear setbacks shall conform to § 29-8 of this ordinance. Average density shall not exceed three (3) dwelling units per acre.

(c) A minimum of seven percent (7%) by acreage shall contain single-family detached or double homes for sale.

Single-family detached homes shall have the following square feet of habitable area exclusive of open porch or attached garage:

1	story	800 - 900 square feet
1½	story	1,000 - 1,100 square feet
2	story	1,100 - 1,200 square feet

Double homes for sale shall have a minimum habitable area of nine hundred (900) square feet per dwelling unit.

Side and rear setbacks under this subsection shall conform to § 29-8 of this ordinance. Average density shall not exceed four (4) dwelling units per acre.

(d) A maximum of thirty percent (30%) by acreage may contain single-family detached dwellings having the following square feet of habitable area exclusive of open porch or attached garage:

1	story	850 - 1,000 square feet
1½	story	1,050 - 1,200 square feet
2	story	1,150 - 1,300 square feet

No structure hereon shall be nearer than eight (8) feet to any interior side or rear lot line. Average density shall not exceed three (3) dwelling units per acre.

(e) A maximum of twenty-seven percent (27%) by acreage may contain multiple dwellings.

The habitable area of dwelling units shall conform to the requirements of Paragraph B of § 29-11 of this ordinance.

The horizontal area of all structures including garages shall not occupy more than twenty percent (20%) of the land area allocated to the multiple dwelling portion of the PUD.

Each dwelling unit shall have two (2) adequate parking spaces, one (1) of which shall be within an enclosed garage.

Average density shall not exceed nine (9) dwelling units per acre for town houses and twelve (12) dwelling units per acre for apartments.

The setback for structures from any street shall be as prescribed in Subparagraph (f) herein.

There shall be a distance between multiple-dwelling buildings not less than the height of the tallest building.

(f) Front setbacks shall be based on the function of the streets. For state and county highways or major town roads, no building unit shall be closer than one hundred (100) feet from the highway line; for internal subdivision streets that function as collectors and feeders to major roads, no building unit shall be closer than fifty (50) from the street line; and on purely internal streets, no building unit shall be closer than thirty (30) feet from the street line.

(g) In all residential areas, the acreage allocated to the various types of residential uses shall include all streets and highways therein, including one-half (½) the width of any abutting street or highway.

(2) Accessory commerical and service uses. For those developments in excess of one hundred (100) acres, commercial and service uses, not to exceed two percent (2%) of the total acreage, may be permitted where such uses are scaled primarily to serve the residents of the PUD.

(3) Customary accessory or associated uses, such as private garages, storage spaces, recreational and community activities, churches and schools, shall also be permitted or required as appropriate to the PUD.

(4) A minimum of ten percent (10%) by acreage shall be set aside for recreational use. Such land must be usable for recreation, such as, but not limited to: picnic areas, playgrounds, hiking trails, ball parks and community centers, and shall be in addition to other open space consisting of areas unsuitable for any use and which by its nature must be left in its natural state for conservation purposes.

(5) Notwithstanding the several average-density limitations hereinabove provided, the average density for the entire PUD shall not exceed four (4) dwelling units per acre. [Added 9-7-71]

(6) As a further standard and limitation on the permitted uses within a PUD District, the ratio of multiple-dwelling units and duplex (two-family) units to single-family detached dwelling units shall not exceed one (1) for one (1). [Added 9-7-71]

E. Common property in the PUD. Common property in a PUD is a parcel or parcels of land, together with the improvements thereon, the use and enjoyment of which are shared by the owners and occupants of the individual building sites. When common property exists, the ownership of such common property may be either public or private. When common property exists in private ownership, satisfactory arrangements must be made for the improvement, operation and maintenance of such common property and facilities, including private streets, drives, service and parking areas and recreational and open space areas.

F. Waiving of requirements. **[Added 5-7-73, effective 5-26-73]**

(1) The general requirements for Planned Unit Developments hereinabove provided may be waived by the Planning Board in making a favorable report to the Town Board on an application for sketch plan approval as provided by § 29-11.22B(3) when, in the Planning Board's judgment, an applicant has successfully borne the burden of proof that his proposal is in the public interest and provides for flexibility in the use of the land and meets the specific performance criteria which a reasonable person might apply, and when, in the Planning Board's judgment, a specific proposed Planned Unit Development, as described by a sketch plan and other information, is clearly consonant with the intent and objectives of the Article as stated in Section 29-11.20A and B. The Planning Board in making such a favorable report, however, shall call to the Town Board's attention its use of the provisions of Subsection F, in lieu of any and all other general requirements, which may be imposed by § 29-11.21A through E.

(2) The Town Board, in granting a Planned Unit Development district zoning, may waive the same general requirements if in its judgment such waiving serves the public interest.

(3) The Planning Board may waive such general requirements in granting either or both preliminary and final approval of a Planned Unit Development site plan.

§ 29-11.22. Planned Unit Development application procedure and zoning-approval process. [Added 6-1-70; effective 6-21-70]

A. General. Whenever any PUD is proposed, before any permit for the erection of a permanent building in such PUD shall be granted, and before any subdivision plat of any party thereof may be filed in the office of the Monroe County Clerk, the developer or his authorized agent shall apply for and secure approval of such PUD in accordance with the following procedures:

B. Application for sketch plan approval.

(1) In order to allow the Planning Board and the developer to reach an understanding on basic design requirements prior to detailed design investment, the developer shall submit a sketch plan of his proposal to the Planning Board. The sketch plan shall be approximately to scale, though it need not be to the precision of a finished engineering drawing; and it shall clearly show the following information:

(a) The location of the various uses and their areas in acres.

(b) The general outlines of the interior roadway system and all existing rights-of-way and easements, whether public or private.

(c) Delineation of the various residential areas indicating for each such area its general extent, size and composition in terms of total number of dwelling units, approximate percentage allocation by dwelling unit type (i.e., single-family detached, duplex, townhouse, garden apartments, high-rise), and general description of the intended market structure (i.e., luxury, middle-income, moderate-income, elderly units, family units, etc.), plus a calculation of the residential density in dwelling units per gross acre (total area including interior roadways) for each such area.

(d) The interior open-space system.

(e) The overall drainage system.

(f) If grades exceed three percent (3%), or portions of the site have a moderate-to-high susceptibility to erosion, or a moderate-to-high susceptibility to flooding and ponding, a topographic map showing contour intervals of not more than five (5) feet of elevation shall be provided, along with an overlay outlining the above susceptible soil areas, if any.

(g) Principal ties to the community at large with respect to transportation, water supply and sewage disposal.

(h) General description of the provision of other community facilities, such as schools, fire protection services and cultural facilities, if any, and some indication of how these needs are proposed to be accommodated.

(i) A location map showing uses and ownership of abutting lands.

(2) In addition, the following documentation shall accompany the sketch plan:

(a) Evidence of how the developer's particular mix of land uses meets existing community demands.

(b) Evidence that the proposal is compatible with the goals of the official Master Plan.

(c) General statement as to how common open space is to be owned and maintained.

(d) If the development is to be staged, a general indication of how the staging is to proceed. Whether or not the development is to staged, the sketch plan of this section shall show the intended total project.

(e) Evidence of any sort in the applicant's own behalf to demonstrate his competence to carry out the plan and his awareness of the scope of such a project, both physical and financial.

(3) The Planning Board shall review the sketch plan and its related documents, and shall render either a favorable report to the Town Board or an unfavorable report to the applicant. The Planning Board may call upon the County Planning Council, the Soil Conservation Service, and any other public or private consultants that they feel are necessary to provide a sound review of the proposal.

(a) A favorable report shall include a recommendation to the Town Board that a public hearing be held for the purpose of considering PUD districting. It shall be based on the following findings which shall be included as part of the report:

[1] The proposal conforms to the Master Plan.

[2] The proposal meets the intent and objectives of PUD as expressed in § 29-11.20.

[3] The general proposal meets all the general requirements of § 29-11.21, Subsections A through E; and/or the Board may consider such proposal in accordance with the provisions of Subsection F of § 29-11.21. **[Amended 5-7-73, effective 5-26-73]**

[4] The proposal is conceptually sound in that it meets a community need and it conforms to accepted design principles in the proposed functional roadway system, land use configuration, open space system, drainage system and scale of the elements, both absolutely and to one another.

[5] There are adequate services and utilities available or proposed to be made available in the construction of the development.

(Cont'd on page 2916.15)

(b) An unfavorable report shall state clearly the reasons therefor and, if appropriate, point out to the applicant what might be necessary in order to receive a favorable report. The applicant may, within ten (10) days after receiving an unfavorable report, file an application for PUD districting with the Town Clerk. The Town Board may then determine on its own initiative whether or not it wishes to call a public hearing.

(4) The Chairman of the Planning Board shall certify when all of necessary application material has been presented, and the Planning Board shall submit its report within sixty (60) days of such certification. If no report has been rendered after sixty (60) days, the applicant may proceed as if a favorable report were given to the Town Board.

C. Application for PUD districting.

(1) Upon receipt of a favorable report from the Planning Board, or upon its own determination subsequent to an appeal from an unfavorable report, the Town Board shall set a date and conduct a public hearing for the purpose of considering PUD districting for the applicant's plan, in accordance with the procedures established under §§ 264 and 265 of the Town Law or other applicable law, said public hearing to be conducted within forty-five (45) days of the receipt of the favorable report or the decision of an appeal from an unfavorable report.

(2) The Town Board shall refer the application to the County Planning Council for its analysis and recommendations, and the Town Board shall also refer the application to the Town Engineer for his review.

(a) The Town Board shall give the County Planning Council at least thirty (30) days to render its

report, and within forty-five (45) days after the public hearing, the Town Board shall render its decision on the application.

(b) The Town Engineer shall submit a report to the Town Board within thirty (30) days of the referral duly noting the feasibility and adequacy of those design elements under his sphere of interest. This report need only concern itself with general conceptual acceptance or disapproval, as the case may be, and in no way implies any future acceptance or rejection of detailed design elements as will be required in the later site-plan review stage. The Town Engineer may also state in his report any other conditions or problems that must be overcome before consideration of acceptance on his part.

D. Zoning for Planned Unit Developments.

(1) If the Town Board grants the PUD districting, the Zoning Map shall be so notated. The Town Board may, if it feels it necessary in order to fully protect the public health, safety and welfare of the community, attach to its zoning resolution any additional conditions or requirements for the applicant to meet. Such requirements may include, but are not confined to, visual and acoustical screening, land-use mixes, order of construction and/or occupancy, circulation systems, both vehicular and pedestrian, availability of sites within the area for necessary public services, such as schools, fire houses and libraries, protection of natural and/ or historic sites, and other such physical or social demands.

(2) PUD districting shall be conditioned upon the following:

(a) Securing of final site-plan approval in accordance with the procedures set forth in § 29-11.23.

(b) Compliance with all additional conditions and requirements as may be set forth by the Town Board in its resolution granting the PUD District.

§ 29-11.23. Site plan approval process for Planned Unit Developments.
[Added 6-1-70; effective 6-21-70]

A. Application for preliminary site plan approval. Application for preliminary site plan approval shall be to the Planning Board and shall be accompanied by the following information prepared by a licensed engineer, architect and/or lanscape architect:

(1) An area map showing applicant's entire holding, that portion of the applicant's property under consideration, and all properties, subdivision, streets and easements within five hundred (500) feet of applicant's property

(2) A topographic map showing contour intervals of not more than one (1) foot of elevation shall be provided.

(3) A preliminary site plan including the following information:

(a) Title of drawing, including name and address of applicant.

(b) North point, scale and date.

(c) Boundaries of the property plotted to scale.

(d) Existing watercou s.

(e) A site plan showing location, proposed use and height of all buildings; location of all parking and truck-loading areas, with access and egress drives thereto; location and proposed development of all open spaces including parks, playgrounds and open reservations; location of outdoor storage, if any; location of all existing or proposed site improvements, including drains, culverts, retaining walls and fences; description of method of sewage disposal and location of such facilities; location and size of all signs; location and proposed development of buffer areas; location and design of lighting facilities; and the amount of building area proposed for nonresidential uses, if any.

(4) A tracing overlay showing all soil areas and their classifications, and those areas, if any, with moderate to high susceptibility to flooding, and moderate to high susceptibility to erosion. For areas with potential erosion problems, the overlay shall also include an outline and description of existing vegetation.

B. Factors for consideration. The Planning Board's review of a preliminary site plan shall include, but is not limited to, the following considerations:

(1) Adequacy and arrangement of vehicular-traffic access and circulation, including intersections, road widths, channelization structures and traffic controls.

(2) Adequacy and arrangement of pedestrian-traffic access and circulation including: separation of pedestrian from vehicular traffic, walkway structures, control of intersections with vehicular traffic and pedestrian convenience.

(3) Location, arrangement, appearance and sufficiency of off-street parking and loading.

(4) Location, arrangement, size and design of buildings, lighting and signs.

(5) Relationship of the various uses to one another and their scale.

(6) Adequacy, type and arrangement of tree, shrubs and other landscaping constituting a visual and/or a noise-deterring buffer between adjacent uses and adjoining lands.

(7) In the case of apartment houses or multiple dwellings, the adequacy of usable open space for playgrounds and informal recreation.

(8) Adequacy of storm water and sanitary waste-disposal facilities.

(9) Adequacy of structures, roadways and landscaping in areas with moderate to high susceptibility to flooding and ponding and/or erosion.

(10) Protection of adjacent properties against noise, glare, unsightliness or other objectionable features.

(11) Conformance with other specific charges of the Town Board which may have been stated in the zoning resolution.

In its review the Planning Board may consult with the Town Engineer and other town and county officials, as well as with representatives of federal and state agencies, including the Soil Conservation Service and the New York State Department of Conservation. The Planning Board may require that exterior design of all structures be made by, or under the direction of, a registered architect whose seal shall be affixed to the plans. The Planning Board may also require such additional provisions and conditions that appear necessary for the public health, safety and general welfare.

C. Action on preliminary site plan application. Within ninety (90) days of the receipt of the application for preliminary

site plan approval, the Planning Board shall act on it. If no decision is made within said ninety-day period, the preliminary site plan shall be considered conditionally approved. The Planning Board's action shall be in the form of a written statement to the applicant stating whether or not the preliminary site plan is conditionally approved. A copy of the appropriate minutes of the Planning Board shall be a sufficient report.

The Planning Board's statement may include recommendations as to desirable revisions to be incorporated in the final site plan, of which conformance with shall be considered a condition of approval. Such recommendations shall be considered a condition of approval. Such recommendations shall be limited, however, to siting and dimensional details within general use areas, and shall not significantly alter the sketch plan as it was approved in the zoning proceedings.

If the preliminary site plan is disapproved, the Planning Board's statement shall contain the reasons for such findings. In such case, the Planning Board may recommend further study of the site plan and resubmission of the preliminary site plan to the Planning Board after it has been revised or redesigned.

No modification of existing stream channels, filling of lands with a moderate to high susceptibility to flooding, grading or removal of vegetation in areas with moderate to high susceptibility to erosion, or excavation for and construction of site improvements shall begin until the developer has received preliminary site plan approval. Failure to comply shall be construed as a violation of the Zoning Ordinance and, where necessary, final site plan approval may require the modification or removal of unapproved site improvements.

D. Request for changes in sketch plan. If in the site plan development it becomes apparent that certain elements of

the sketch plan, as it has been approved by the Town Board, are unfeasible and in need of significant modification, the applicant shall then present his solution to the Planning Board as his preliminary site plan, in accordance with the above procedures. The Planning Board shall then determine whether or not the modified plan is still in keeping with the intent of the zoning resolution. If a negative decision is reached, the site plan shall be considered as disapproved. The developer may then, if he wishes, produce another site plan in conformance with the approved sketch plan. If an affirmative decision is reached, the Planning Board shall so notify the Town Board, stating all of the particulars of the matter and its reasons for feeling the project should be continued as modified. Preliminary site plan approval may then be given only with the consent of the Town Board.

E. Application for final detailed site plan approval. After receiving conditional approval from the Planning Board on a preliminary site plan, and approval for all necessary permits and curb cuts from state and county officials, the applicant may prepare his final detailed site plan and submit it to the Planning Board for final approval; except that if more than twelve (12) months have elapsed between the time of the Planning Board's report on the preliminay site plan and if the Planning Board finds that conditions have changed significantly in the interim, the Planning Board may require a resubmission of the preliminary site plan for further review and possible revision prior to accepting the proposed final site plan for review.

The final detailed site plan shall conform substantially to the preliminary site plan that has received preliminary site plan approval. It should incorporate any revisions or other features that may have been recommended by the Planning Board and/or the Town Board at the preliminary review. All such compliances shall be clearly indicated by the applicant on the appropriate submission.

F. Action on the final detailed site plan application. Within sixty (60) days of the receipt of the application for final site plan approval, the Planning Board shall render a decision to the applicant and so notify the Town Board. If no decision is made within the sixty-day period, the final plan shall be considered approved.

(1) Upon approving an application, the Planning Board shall endorse its approval on a copy of the final site plan and shall forward it to the Building Inspector, who shall then issue a building permit to the applicant if the project conforms to all other applicable requirements.

(2) Upon disapproving an application, the Planning Board shall so inform the Building Inspector. The Planning Board shall also notify the applicant and the Town Board in writing of its decision and its reasons for disapproval. A copy of the appropriate minutes may suffice for this notice.

G. Staging. If the applicant wishes to stage his development, and he has so indicated, then he may submit only those stages he wishes to develop for site plan approval, in accordance with his staging plan. Any plan which requires more than twenty-four (24) months to be completed shall be required to be staged, and a staging plan must be developed. At no point in the development of a PUD shall the ratio of nonresidential to residential acreage or the dwelling unit ratios between the several different housing types for that portion of the PUD completed and/or under construction differ from that of the PUD as a whole by more than twenty percent (20%).

§ 29-11.24. Other regulations applicable to Planned Unit Developments.
[Added 6-1-70; effective 6-21-70]

A. Regulation after initial construction and occupancy. For the purpose of regulating and development and use of property after initial construction and occupancy, any changes other than use changes shall be processed as a special permit request to the Planning Board. Use changes shall also be in the form of a request for special permit except that Town Board approval shall be required. It shall be noted, however, that properties lying in PUD Districts are unique and shall be so considered by the Planning Board or Town Board when evaluating these requests, and maintenance of the intent and function of the planned unit shall be of primary importance.

B. Site-plan review. Site-plan review under the provisions of this Article shall suffice for Planning Board review of subdivision under town subdivision regulations, subject to the following conditions:

(1) The developer shall prepare sets of subdivision plats suitable for filing with the office of the Monroe County Clerk in addition to those drawings required above.

(2) The developer shall plat the entire development as a subdivision; however, PUD's being developed in stages may be platted and filed in the same stages.

(3) Final site-plan approval under § 29-11.23F shall constitute final plat approval under the town subdivision regulations, and provisions of § 276 of the Town Law requiring that the plat be filed with the Monroe County Clerk within ninety (90) days of approval shall apply.

§ 29-11.25. Financial responsibility for construction in Planned Unit Developments.
[Added 6-1-70; effective 6-21-70]

No building permits shall be issued for construction within a PUD District until improvements are installed or performance bond posted in accordance with the same procedures as provided for in § 277 of the Town Law relating to subdivisions. The Town Board may require other proof of financial responsibility of the developer so as to insure completion of each phase of any development.

§ 29-11.30. Multiple dwellings for the elderly.
[Added 7-6-71, effective 8-1-71]

The Town Board may, on special application, issue a permit for the construction and maintenance of multiple dwellings for the elderly, as hereinafter defined, in any district of the town except Residential "AA" District.

A. "Multiple dwelling for the elderly" is defined as a building or a group of buildings whose primary purpose is to house one (1) or more persons of the age of sixty (60) years or more in independent living accommodations, but not including independent kitchen and dining facilities. Central kitchen and dining facilities to permit the congregate feeding of the residents are a required part of the concept. The following accessory facilities may be included within the structure or structures: Hobby shop, game rooms, library, meeting rooms, health center.

B. No such permit shall be issued until the application has been referred to the Planning Board for a recommendation. Prior to recommending the issuance of such permit, the Planning Board shall find after public notice and hearing that:

(1) The proposed use at the particular location is necessary or desirable to provide a service or facility which will contribute to the general well-being of the neighborhood or the community.

(2) The proposed use would not endanger or tend to endanger public health, safety, morals or general welfare of the community. In making such determination, the Board shall consider: lot areas; necessity for and size of buffer zones; type of construction; parking facilities; traffic hazards; fire hazards; offensive odors, smoke, fumes, noise and lights; the general character of the neighborhood; the availability of public sewers; the nature and use of other premises and the location and use of other buildings in the vicinity; and whether or not the proposed use will be detrimental to neighborhood property.

(3) The proposed use will be in harmony with the probable future development of the neighborhood and will not discourage the appropriate development and use of adjacent lands and buildings or impair the value thereof.

C. After receiving the recommendation of the Planning Board, the Town Board may grant such a permit, or refuse to grant the same, as hereinafter provided:

(1) If the Planning Board has recommended the granting of the permit, the Town Board may grant the same forthwith.

(2) If the Planning Board has recommended the denial of the permit, the Town Board may deny the same forthwith.

(3) If the Planning Board has recommended the granting of the permit, the Town Board may deny the same after public notice and hearing.

(4) If the Planning Board has recommended the denial of the permit, the Town Board may grant the same after public notice and hearing, and after making the findings provided in Paragraph B of this section.

D. In granting such a permit the Town Board may attach such conditions and limitations as it considers desirable in order to assure compliance with the application and the purposes of this ordinance.

E. Subject to the payment of the annual renewal fee, as hereinafter provided, any such permit granted hereunder shall be deemed to be indefinitely extended; provided, however, that it shall expire if the special use shall be terminated, abandoned or cease for more than six (6) months for any reason, or if there is a default in the payment of the renewal fee; and further provided that it may be revoked by the Town Board after due hearing on not less than ten (10) days' notice to the person holding such permit in the event the use thereof violates any of the conditions or restrictions imposed by the Town Board upon the issuance of such permit or shall have become a nuisance.

F. The Town Clerk of the Town of Penfield shall issue a permit to the applicant upon a proper resolution by the Town Board and the payment of a fee of one hundred dollars ($100.) and shall issue a renewal annually thereafter in January of each year upon payment of a like fee.